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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

IN RE: SOUTHEAST BANKING CORP. SECURITIES LITIGATION

WILLIAM A. BRANDT, JR., AS ADMINISTRATOR OF THE INVESTMENT PLUS PLAN OF THE SOUTHEAST BANKING CORPORATION,

Petitioner,

—v.—

HARVEY WEINER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether in a Rule 23(b)(3) class action—absent Rule 24 intervention—an unnamed class member, who follows the procedures set forth in a Rule 23(e) settlement notice and properly objects to a settlement, has standing to appeal the district court's order approving the settlement over his timely objection.

Rule 29.1 Listing

Pursuant to Rule 29.1 of this Court's Rules, petitioner William A. Brandt, Jr., as Administrator of the Investment Plus Plan (the "Plan"), a pension plan for former employees of Southeast Banking Corporation and its affiliates, hereby submits the following list of subsidiaries of Southeast Banking Corporation:

Financial Carriers, Inc.
First Development Corp. of Jacksonville
First National Bank of Palm Beach, Incorporated, The
First Pioneer Corporation
Second Pioneer Corporation
First Plus Insurance Agency, Inc.
Latin American Agribusiness Development Corporation
L.A.A.D. Americas, S.A.
L.A.A.D. Caribe, S.A.
L.A.A.D. De Centroamerica, S.C.
L.A.A.D. Marketing Company, Inc.
SEMCO Services, Inc.
SWQ Holdings, Inc.
Southeast Acquisition Company
First National Bank in Palm Beach
(F/K/A: Palmer FNB&T Co. of Sarasota)
Southeast Bank, National Association
700 Island Way Management Co., Inc.
62nd Street, Inc.
13899 Biscayne Blvd, Inc.
Amber Real Estate Holdings, Inc.
Bluehill Corporation
Chas. Corp.
Country, Inc.
Court House Center, Inc.
Cumberland Real Estate Co. of Fort Lauderdale, Inc.

Derf, Inc.
Derf Millpond, Inc.
Getaway Bay Development Co., Inc.
Jedi, Inc.
Jenbank, Inc.
Juana Corp.
Lochey Corp.
MFC, Inc.
McDoel Hotel, Inc., The
Melvin Limited, Inc.
Metro Center, Inc.
Misty, Inc.
Oak Winds Management, Inc.
Overage, Inc.
Qualls, Inc.
SEFC Building Corporation
S.E.T.L.D. Co., Inc.
Southeast Bank Brokerage Service, Inc.
Southeast Bank Leasing Company
Southeast Credit Insurance Company
Southeast Mortgage Company
  Finger Lakes Development Corporation
  One Hundred Street, Inc.
  SEMCO Properties, Inc.
  UNIFICO, Inc.
Southeast Office Park IV, Inc.
Southeast SBIC, Inc.
Southeast Video Services, Inc.
Southern Land Holding Company, Inc.
Sylvan Properties, Inc.
Tara Holdings, Inc.
V.W.S. Development Company, Inc.
Valentine Investments, Inc.
Valmal, Incorporated
Vero Capital Company
Western Hospitality, Inc.

Southeast Bank of West Florida
    Oro Boychik, Inc.
Southeast Credit Insurance Agency, Inc.
Southeast Merchant Banking Corporation
Southeast Properties, Inc.
Southeast Switch, Inc.
Southeast Venture Capital, Ltd. I
Southeast Venture Capital, Ltd. II

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OPINIONS BELOW

The opinion of the Eleventh Circuit, App. at 1a-2a,[1] is reported at 51 F.3d 1003 (11th Cir. 1995). The Order and Final Judgment of the District Court, App. at 3a-11a, is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1995. A timely petition for rehearing and a suggestion for rehearing *en banc* were denied on July 19, 1995. App. at 12a-13a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case presents again substantially the same issue that was before the Court last term in *Bramon v. Barnett Banks, Inc.*, 38 F.3d 572 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1824 (1995), two terms ago in *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993), and five terms ago in *Shores v. Sklar*, 844 F.2d 1485 (11th Cir. 1988), *cert. denied*, 493 U.S. 1045 (1990). This split in the Circuits is obviously not resolving itself, and is now both wider and more mature than a year ago.

In those cases and in this case, the issue was whether in a Rule 23(b)(3) class action—absent intervention pursuant to Federal Rule of Civil Procedure 24—an unnamed class member who follows the procedures set forth by the district court in a Rule 23(e) notice regarding the filing of written objections and then appears through counsel before the district court to press those objections has standing to appeal the district court's approval of the settlement over those objections. Below, the Eleventh Circuit, in conflict with the Third, Sixth,

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[1] Citation to "App. at __" refers to the appendix to this petition.

Seventh and Ninth Circuits, and in accordance with the Fifth, Eighth, and Tenth Circuits, ruled that such a litigant lacked standing to appeal.[2] This split among no less than eight circuits is mature and growing. This Court should act now to resolve this split in authority regarding the application of the class action rules it promulgated. *See Shults v. Champion Int'l Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3rd Cir. 1993); *Bell Atlantic Corp., v. Bolger*, 2 F.3d 1304 (3rd Cir. 1993); *VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992); *Silber v. Mabon*, 957 F.2d 697 (9th Cir. 1992). *Compare Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop's, Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987).

A. Factual and Procedural Background

This action[3] arises from a final Order of the United States District Court for the Southern District of Florida, approving the settlement of a Rule 23(b)(3) securities class action for $5 million (the "Settlement") brought on behalf of certain purchasers of stock of Southeast Banking Corporation ("South-

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[2] As discussed more fully below, the Tenth Circuit has modified its position on this issue since the District Court's ruling in this case to a position which supports Petitioner. *See Rosenbaum v. McAllister*, 64 F.3d 1439 (10th Cir. 1995).

[3] On or about March 22, 1990, a class action pursuant to Rule 23(b)(3) alleging violations of federal securities laws was commenced against Southeast Banking Corporation and certain of its officers and directors in the United States District Court for the Southern District of Florida, entitled *Harvey Wiener, et al. v. Southeast Banking Corp., et al.*, No. 90-0760 (S.D. Fla.). Five days later, on or about March 27, 1990, a second securities class action entitled *William J. Hall, et al. v. Southeast Banking Corp., et al.*, No. 90-0838 (S.D. Fla.), was filed in the District Court. The two actions were consolidated as one class action entitled *In Re: Southeast Banking Corp. Securities Litigation*, No. 90-0760 (S.D. Fla.). This petition arises from the consolidated actions.

east") (the "Class") and awarding Class Counsel 25% of the $5 million settlement fund, plus disbursements. It is black letter law that the action could not have been settled without affording both notice and an opportunity to be heard to Petitioner and the other absent class members. *See* Fed. R. Civ. P. 23(c)(2) & (e).

The fact that the action was brought pursuant to Rule 23(b)(3) is determinative of the issue presented to this Court. Class actions pursuant to Rule 23(b)(1) & (2) can be settled without affording absent class members notice of the settlement and an opportunity to be heard. *See* Fed. R. Civ. P. 23(c)(2). Rule 23(b)(3) class actions and Rule 23.1 shareholders derivative actions can be settled *only* on adequate notice of the settlement to absent class members and providing them the opportunity to be heard regarding its adequacy. Accordingly, class members in Rule 23(b)(1) & (2) actions need to intervene pursuant to Rule 24 if they wish to appear before a district court for any purpose. Here, the Petitioner was summoned to the District Court regarding the proposed settlement by order of the District Court. In Response to the District Court's order Petitioner timely filed written objections to the settlement and appeared through counsel at the settlement hearing before the District Court to press those objections.

The District Court was obliged to hear Petitioner's objections pursuant to Rules 23(c)(2) & (e). After having heard Petitioner's objection, the District Court "rubber stamped" the proposed settlement by signing a judgment prepared by Class Counsel without any modifications. Petitioner timely appealed.

In dismissing the appeal, the United States Court of Appeals for the Eleventh Circuit concluded pursuant to *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), that Petitioner William A. Brandt, Jr., as Administrator of the Investment Plus Plan (the "Plan"), a pension plan for former employees of Southeast and its affiliates, who appeared below in response to the District Court's ordered notice on behalf

of more than 5,000 Plan beneficiaries, who are also class members, and vigorously objected to the award of attorneys' fees and disbursements, lacked standing to appeal the District Court's order approving the settlement and awarding $1.25 million in attorneys' fees.

Class Counsel entered into a proposed settlement with Defendants on or about August 20, 1993, without the benefit of any substantive discovery. The proposed settlement defined the class as follows:

> The "Class" and "Class Members" mean all persons who purchased or otherwise acquired Southeast Securities during the Class Period (based upon transaction date), including their spouses, heirs, executors, *administrators*, successors and assigns, if any. . . .

(App. at 21a) (emphasis added). The Settlement stipulation required that notice be given to all class members. The Settlement stipulation further required Class Counsel to publish in papers of general circulation a summary notice approximately one week following the mailing of the notice to all class members.

On August 27, 1993, the District Court signed a preliminary order approving the Settlement and requiring notice to the class members. The Order with Respect to Notice, Settlement Hearing and Administration provided in pertinent part:

> Any Class Member who does not elect to be excluded may appear at the Settlement Hearing in person or by Counsel, if an appearance is filed and served as hereinafter provided, and may be heard to the extent allowed by the Court in support of, *or in opposition to, the fairness, reasonableness and adequacy of the proposed Settlement, the requested awards of attorneys' fees and reimbursement of expenses . . . provided, however, that no person shall be heard in opposition to the proposed Settlement and the judgment to be entered thereon, or to the requested awards of attorneys' fees and reimbursement of expenses, unless, on or before 15 days before the*

> *[Settlement hearing] such person: [files with the court a notice of intention to appear] together with a statement that indicates the basis for such opposition along with any supporting documentation.*

(App. at 55a-56a.)[4]

On or about October 12, 1993, Class Counsel submitted a joint petition for an award of attorneys' fees (the "Fee Petition") to the District Court seeking $1,250,000—25% of the $5 million common fund—in attorneys' fees, and reimbursement for expenses in the amount of $98,579.95. Aside from summaries, general conclusory statements and the resumes of Class Counsel, the Fee Petition provided no evidence as to the reasonableness of Class Counsel's Fees.

B. Petitioner's Timely Objections and The District Court's Order and Final Judgment

On November 1, 1993, Petitioner on behalf of the more than 5,000 Class Members, who are beneficiaries of the Plan and comprised more than 10.5% of the total plaintiff class, filed a Notice of Intention to Appear at the Settlement Hearing to Oppose Class Counsel's request for Attorneys' Fees and Reimbursements for Expenses. (App. at 58a-60a.) The same day, the Petitioner also filed a Memorandum of Law strenuously opposing Class Counsel's request for Attorneys' Fees and Disbursement for Expenses. (App. at 61a-71a.) On November 15, 1993, the Petitioner through counsel appeared at the Settlement Hearing pursuant to the District Court's ordered notice and vigorously objected to Class Counsel's request for Attorneys' Fees and Disbursement for Expenses. In fact the transcript of the settlement hearing is fifty-seven pages long—thirty-one of which deal almost exclusively with the Petitioner's objections to Class Counsel's Fee Application.

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[4] Neither in the Class Notification nor at any other time during the proceedings in district court did class counsel notify the class members that to preserve their rights to appeal they had to formally intervene pursuant to Federal Rule of Civil Procedure 24.

On November 23, 1993, the District Court signed an order prepared by class counsel approving the Settlement, including the requested attorneys' fees and disbursements. The Petitioner timely appealed the District Court's Order on the grounds that (1) no evidentiary basis existed for the District Court's award of attorneys' fees and expenses, and (2) the District Court failed to follow the Eleventh Circuit's mandate in *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 775 (11th Cir. 1991) (holding that an award of attorneys' fees must be reasonably calculated by the district court, who must articulate and identify all factors upon which it relied and explain how each factor affected the fees awarded).

C. The Court of Appeals' Opinion

On May 9, 1995, the Eleventh Circuit dismissed the appeal, holding that as an unnamed class member who did not intervene, the Petitioner lacked standing to appeal the District Court's order on attorneys's fees. The sole authority cited by the Court is *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), in which the court denied standing to a dissenting class member of a Rule 23(b)(2) class action who was not afforded the opportunity to object and made no attempt to intervene under Rule 24. Instead, the dissenting class member participated in the action by filing an appeal from the district court's entry of final judgment. The court in *Guthrie* held that because of his failure to intervene, the appellant, a member of a class of inmates challenging the conditions of their confinement at a state prison, had no standing to appeal. 815 F.2d at 628.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Although an adverse judgment is appealable only by the parties to a lawsuit, *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam), the issue of whether an unnamed *but timely objecting member* of a Rule 23(b)(3) class action may appeal

the district court's approval of the settlement and/or that part of the settlement relating to attorneys' fees remains unsettled. The two leading treaties on federal practice support the axiom that a class member who appears before the district court and objects to a settlement has standing to appeal an adverse ruling. *See* James W. Moore & John E. Kennedy, 3B MOORE'S FEDERAL PRACTICE ¶ 23.80, at 496 (2d ed. 1992) ("A member of a class who appears in response to the court's notice . . . and objects to the [settlement] has a right to appeal from an adverse final judgment although he did not become a formal party of record."); Charles A. Wright, *et al.*, 7B FEDERAL PRACTICE AND PROCEDURE § 1797, at 360-61 (2d ed. 1986) ("Of course, if the class member appears in response to the notice and puts forth his objections, he can attack the dismissal or compromise on appeal from the entry of the final judgment."); *See also* Herbert B. Newberg, 1 NEWBERG ON CLASS ACTIONS § 1.08, at 13-14 (2d ed. 1985) ("Certainly class members are parties for purposes of being subject to a binding judgment or for purposes of objecting to and appealing from an order approving a class settlement . . . .").

The views of the commentators notwithstanding, the Fifth, Eighth, Tenth and Eleventh Circuits,[5] in direct conflict with the Third, Sixth, Seventh and Ninth Circuits,[6] have ruled that an unnamed class member lacks standing to appeal an order approving a settlement. More recently, the Tenth Circuit revisited its rule that an unnamed class member lacks standing to appeal the approval of a settlement agreement at least insofar as an award of attorneys' fees is concerned. *See*

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[5] *See, e.g., Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop's, Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1991); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987).

[6] *See, e.g., Shults v. Champion Int'l Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3d Cir. 1993); *Bell Atlantic Corp., v. Bolger*, 2 F.3d 1304 (3d Cir. 1993); *VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992); *Silber v. Mabon*, 957 F.2d 697 (9th Cir. 1992).

Rosenbaum v. MacAllister, 64 F.3d 1439, 1443 (10th Cir. 1995). In *Rosenbaum*, the Tenth Circuit exacerbated the split in the circuits by ruling that, while an unnamed class member who timely objected at the settlement hearing before the district court without formally intervening lacks standing to challenge on appeal the approval of that settlement agreement, that same class member "has standing to appeal the district court's award of attorneys fees and expenses to the plaintiffs' attorneys." *Id.*

Regrettably, none of the decisions[7] focus on the "bright line" between (a) Rule 23(b)(1) & (2) class actions, which can be settled without affording class members notice and an opportunity to be heard, and (b) Rule 23(b)(3) & 23.1 class and shareholder derivative actions, which cannot be settled absent such notice and hearing. *See* FED. R. CIV. P. 23(c)(2) & (e).

The split among the Circuits destroys geographic uniformity in this important area of federal procedural law. In addition to thwarting the substantive rights of many litigants, the inconsistencies in the Circuits leave unnamed class members without a clear sense of their rights and thus calls for the adoption of a uniform rule. For all these reasons, *certiorari* is warranted.

II. THE MATURE AND GROWING SPLIT IN THE CIRCUITS

A. The Split In The Circuits

As stated above, the principle that an unnamed party, who has timely objected at the district court level has standing to appeal an order approving a settlement has been the subject of much debate in the Circuits. None of the decisions compare the fundamental differences between Rule 23(b)(1) & (2) class actions as opposed to Rule 23(b)(3) and 23.1 class and shareholder derivative actions, which cannot be settled without notice to absent class members and provision of a hearing on their objections, if any, to the proposed settlement.

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[7] Cited in footnotes 5 and 6, *supra*.

1. Third Circuit

It is well-settled in the Third Circuit that an unnamed class member has the right to appeal all aspects of a settlement agreement, including attorneys' fees. In *Ace Heating & Plumbing Co. v. Crane Co.*, the court held that unnamed class members had standing to appeal a settlement in a nationwide Rule 23(b)(3) class action antitrust case, even though the appellants had not objected in the district court and could have excluded themselves from the settlement. 453 F.2d 30, 32 (3d Cir. 1971). The Third Circuit stated that "ordinarily, aggrieved class members may appeal any final order of a district court in proceedings held pursuant to Rule 23. *Id.* Furthermore, the court observed that the right to be excluded is often illusory where class members' claims would be too small to litigate unless aggregated, and concluded that a right to appellate review was necessary to guard against unfair settlements. *Id.* at 33.

In *Bell Atlantic Corp. v. Bolger*, the Third Circuit discussed at length the current split in the Circuits on whether an objecting member of a class or derivative litigation[8] lacks standing to appeal a settlement agreement, and held that a shareholder in a derivative suit, who failed to intervene, but did object to the settlement agreement in district court, had standing to appeal the order approving the settlement. 2 F.3d 1304, at 1307-09.

The court concluded that "assuring fair and adequate settlements outweigh concerns that non-intervening objectors will render the representative litigation 'unwieldy.' It is sufficient that the [party] attended the settlement hearing and voiced before the district court the same objections he now raises before us on appeal." *Id.* at 1310.

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[8] As in a Rule 23(b)(3) action, Federal Rule of Civil Procedure 23.1 also requires that to satisfy due process, unnamed shareholders in a shareholder derivative suit must be given notice of any dismissal or compromise, and such notice "must be sufficiently informative and give sufficient opportunity for response." *Bell Atlantic Corp.*, 2 F.3d at 1317 (quoting *Kyriazi v. Western Elec. Co.*, 647 F.2d 388, 395 (3d Cir. 1981)).

More recently, in *Carlough v. Amchem Products, Inc.*, the Third Circuit, affirming the rule in *Ace Heating*, held that unnamed class members in a Rule 23(b)(3) action would be able to appeal from the district court's final approval or disapproval of any settlement of action and, thus, they could not appeal denial of intervention under the collateral order doctrine. 5 F.3d 707, 713-14 (3d Cir. 1993).

Therefore, it is well established in the Third Circuit that an unnamed class member who objects to a settlement agreement has standing to appeal all aspects of the agreement, including attorneys' fees.

2. Sixth Circuit

The Sixth Circuit also adheres to the same axiom. In *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942), the Sixth Circuit did not require intervention as a predicate to appeal by an unnamed class member. In *Cohen*, an unnamed class member in a Rule 23(b)(3) secondary class action, challenged a final judgment approving and adopting a settlement agreement. The unnamed class member had both appeared at the hearing to oppose the settlement and moved to intervene in the action. The motion to intervene was denied and the unnamed class member did not contest it. The class member did, however, appeal the district court's order approving the settlement. The Sixth Circuit held that an unnamed class member who had objected to a proposed settlement was "entitled as of right to prosecute the appeal." *Cohen*, 127 F.2d at 724.

In *Sertic v. Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972), the Sixth Circuit concluded that unnamed class members of a Rule 23(b)(3) whose petitions to intervene had been denied by the district court, had standing to appeal the settlement agreement. The court stated the case fell "almost squarely within our decision in *Cohen v. Young*." *Id.* at 581. The Sixth Circuit further noted:

> The only relevant distinction between the present case and *Cohen* lies in the omission of the District Court

> herein to notify the members of the class of the proposed orders and to afford them opportunity to present any adverse claims thereto. If such notice was not required in the present case, we would be forced to conclude that appellant was never in the position of a 'defendant who is summoned by process of court' and therefore has no standing to bring the appeal. Notice was, however, required.

Id.

In *Shults v. Champion Int'l Corp.*, 35 F.3d 1056 (6th Cir. 1994), the court held that "because *Sertic* and *Cohen* remain good law, *Gottlieb's* apparent reading of [*Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987)], that intervention is a necessary prerequisite . . . for an unnamed class member to have standing to appeal, see [*Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993], is thus not controlling on this circuit." The Court then stated:

> In brief, a non-named class member has standing to appeal a settlement order if he has formally intervened in the action (indeed, non-parties generally obtain such standing upon intervention). However, a non-named party that has not been permitted to intervene may also have standing to bring a direct appeal if a motion to intervene, which is then appealed, should have been granted. *A nonnamed party may also have standing to appeal if the district court has otherwise 'summoned' him into court.* Of course, as the Supreme Court has indicated, 'the better practice is . . . to seek intervention for purposes of appeal."

Id. at 1061 (quoting *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (emphasis added.) We again point out that in the settlement of Rule 23(b)(3) and 23.1 class and shareholder actions all absent class members are required to be "summoned into court" as part of the settlement approval process. FED. R. CIV. P. 23(e). That is not true of Rule 23(b)(1) and (2) class actions.

3. Seventh Circuit

The Seventh Circuit was one of the first circuits to hold that an unnamed class member has standing to appeal an adverse ruling if the class member objected below.

In *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059, 1060-61 (7th Cir. 1970), unnamed Rule 23(b)(3) class members appealed an order approving a settlement in an antitrust action. The appealing class members, however, were not only unnamed class members, but they also failed to object at the settlement hearing. The Seventh Circuit dismissed the appeal and held that if a "class member intervenes or even appears in response to a notice pursuant to [Federal Rule of Civil Procedure] 23(e) and *objects* to the dismissal or compromise, *he has a right to appeal from an adverse final judgment*. . . . However, . . . a person in disagreement with the terms of the settlement must take, at least, these minimal steps to preserve his right to appeal." *Id.* (emphasis added) (citations omitted.)

Some courts have erroneously read a discrepancy in *Asgrow's* language as requiring not only an objection, but also intervention by an unnamed class member that seeking appeal. *See Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 679 (8th Cir. 1992). The *Asgrow* court, in a footnote stated that it "need not consider the factual questions concerning the degree of participation by appellants in the settlement hearing and negotiations since the failure of appellants formally to intervene, after receipt of notice under Rule 23(e) before judgment forecloses their right to appeal." *Asgrow*, 425 F.2d at 1060, n.2. Several factors, however, indicate that the language in the body of the *Asgrow* opinion should control. First, the Asgrow appellees raised this point to show the appellants' acquiescence in the settlement; they did not argue they had met the court's appearance requirement. *Id.* Second, the body of the text cites *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942), with approval. Finally, the *Asgrow* holding was affirmed by Seventh Circuit in *Tryforos v. Icarian Development Co., S.A.*, 518 F.2d 1258, 1263 n.22 (7th Cir. 1975), *cert. denied*, 423 U.S. 1091 (1976) (holding that a unnamed party who appears

and presents objections has standing to appeal), in *Armstrong v. Board of School Directors*, 616 F.2d 305, 327 (7th Cir. 1980) ("an unnamed class member who appears in response to a Rule 23(e) notice and objects to settlement has right to appeal from adverse judgment."), and in *VMS Limited Partnership Securities Litigation*, 976 F.2d 362, 368 (7th Cir. 1992) (affirming the *Asgrow* holding, but holding that *Asgrow* would not apply to an appeal of a post-settlement order implementing the settlement agreement). *See also Armstrong v. Board of School Directors*, 616 F.2d 305, 327 (7th Cir. 1980) (*citing Asgrow* for the proposition that "an unnamed class member who appears in response to a Rule 23(e) notice and objects to a settlement has a right to appeal from an adverse judgment.").

4. Ninth Circuit

The Ninth Circuit has also established that an unnamed class member has standing to appeal a settlement agreement. In *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir, 1977), the Ninth Circuit held that unnamed Rule 23(b)(3) class members have standing to appeal an order approving a settlement simply because their rights were being adjudicated. *Id.* at 1176. *See also In re Cement Antitrust Litigation*, 688 F.2d 1297, 1309 *aff'd* 459 U.S. 1191 (1983) (9th Cir, 1982) (an unnamed "class member may appeal from an order approving a settlement to which the member objects"); *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981) (unnamed class member who objected to settlement "could have challenged it by direct appeal").

More recently, in *Silber v. Mabon*, 957 F.2d 697, 699-700 (9th Cir. 1992), the court held that generally, as long as an unnamed Rule 23(b)(3) class member appears in response to a notice of hearing of proposed settlement "and puts forth his objections, he can attack the dismissal or compromise on appeal from entry of the final judgment." *Id.* (citations omitted.)

B. The Conflicting Decisions Of The Fifth, Eighth, Tenth And Eleventh Circuits

The holdings of the cases above are in direct conflict with decisions of the Fifth, Eighth, Tenth and Eleventh Circuits. *See Gottlieb v. Wiles*, 11 F.3d 1004, 1007 (10th Cir. 1993) (citing the Eleventh Circuit's decision in *Guthrie* for the proposition that an unnamed class member who has not intervened lacks standing to appeal); *Loran v. Furr's/Bishop's Inc.*, 988 F.2d 554, 554 (5th Cir. 1993) (court lacks jurisdiction to consider appeal by class member who has not intervened below); *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 680 (8th Cir. 1992) (holding that an unnamed class member who objected at the settlement hearing but did not intervene lack standing to appeal); *Walker v. City of Mesquite*, 858 F.2d 1071, 1073 (5th Cir. 1988)[9] (concluding that unnamed class members could not appeal from a consent decree).[10]

C. Recent Developments In The Tenth Circuit Regarding Awards Of Attorneys' Fees To Class Counsel

To further exacerbate the conflict among the Circuits, on August 15, 1995, the Tenth Circuit revisited its rule previ-

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[9] In contrast to the Petitioner here, the appealing class members in *Walker* did not object during the settlement hearing. Instead they attempted to intervene during the appeal process after the final judgment was entered and, thus, did not participate at all in the proceedings in district court. 858 F.2d at 1075.

[10] The courts have not made a distinction between class actions and derivative suits for purposes of determining the prerequisites to standing to appeal. For example, in *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1307-08 (3d Cir. 1993), which was a shareholder derivative action, the court freely interchanges class actions and derivative suits in its discussion of standing to appeal. The court stated that "it is not settled whether an objecting member of the class or derivative litigation who is not a named party may appeal the court's approval of the compromise." *Id. See Schults v. Champion International Corp.*, 35 F.3d 1056, 1059 (6th Cir. 1994) (in class action, court cites, *Bell Atlantic Corp.*, in its discussion of standing). *See also* Note 8, *supra*.

ously affirmed in *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993) that an unnamed class member absent intervention has no standing to appeal a district court's approval of the settlement agreement in a class action. In *Rosenbaum v. MacAllister*, 64 F.3d 1439 (10th Cir. 1995), a case involving both a shareholder's derivative suit under Rule 23.1 and a Rule 23(b)(3) class action, the Tenth Circuit stated: "The purpose of Rule 23 and class actions generally, is to unify and render manageable litigation in which there are many members of a homogeneous class with common claims against a defendant. . . . These Rule 23 requirements in part are for the benefit of the defendant to allow it to settle in one suit its liability to all members of the class who have not opted out." *Id.* at 1442. The court further stated that to allow a nonintervening class member to appeal the approval of a settlement, would permit one individual to delay any benefits that may accrue to the class as a result of the settlement. *Id.*

The Tenth Circuit, however, held that "to allow an individual dissident class member, who did not intervene, to appeal an attorney's fee award would not be nearly as disruptive." *Id.* On the contrary, the court concluded should the dissident's appeal succeed in reducing those fees, there would be additional funds for the later distribution to the class members. *Id.* Further, the court noted that the strength of the representation afforded to the class by the named class members is most likely to break down in the context of evaluating the award of fees to the named class members' attorneys. *Id.* The unnamed class members are in a superior position to evaluate the propriety of the fees awarded to the attorneys chosen by the named class members, as the unnamed class members may take an unbiased look at the representation provided by the attorneys. *Id.* Thus, the Tenth Circuit held that a "nonintervenor class member and shareholder who made written and oral objections at the fee hearing, has standing to appeal the court's award of attorneys fees and expenses to the plaintiffs' attorneys." *Id.* at 1443.

The Tenth Circuit's holding in *Rosenbaum* supports the Petitioner's position, and is in direct conflict with the Eleventh Circuit's holding below denying Petitioner's standing to appeal the district court's order on attorneys' fees.

D. Confusion Created By This Court's Decision In *Marino v. Ortiz*

Some of the Circuits cite *Marino v. Ortiz*, 484 U.S. 301 (1988), for support of the rule that an unnamed class member must properly intervene to have standing to appeal a district court order approving a settlement agreement to which they timely objected. Their reliance is misplaced.

In *Marino*, this Court was faced with an appeal from a final hearing approving a consent decree in settlement of a Rule 23(b)(2), an action brought under Title VII of the Civil Rights Act of 1964. The action was brought on behalf of Black and Hispanic police officers. The settlement provided injunctive relief, which was why Rule 23(b)(3) was not implicated. The petitioners, White officers, challenged the class settlement notwithstanding the fact that they were *neither* class members *nor* parties to the underlying lawsuit in any way. *Id.* at 304. This Court ruled "that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Id.* (citations omitted).

However, this quote has been taken out of context to support the principle that unnamed Rule 23(b)(3) class members must intervene in addition to objecting timely in order to have standing to appeal. Support for such a principle cannot be found in *Marino* because this Court was concerned about whether a *nonparty* has standing to appeal, not whether an absent Rule 23(b)(3) class member has standing to appeal a settlement of which he had notice and to which he timely objected in the district court. Furthermore, as shown above (1) prior to *Marino*, the Circuits were split on whether an unnamed class member, absent intervention, has standing to challenge a district court's approved settlement agreement and/or that part of the settlement involving attorneys' fees,

and (2) presently, the Circuits are more divided than before *Marino*. *See Shults v. Champion Int'l Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3rd Cir. 1993); *Bell Atlantic Corp., v. Bolger*, 2 F.3d 1304 (3rd Cir. 1993); *VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992); *Silber v. Mabon*, 957 F.2d 697 (9th Cir. 1992). *Compare Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop's, Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987).

III. THE APPLICATION OF THE RULE OF *GUTHRIE* DOES NOT COMPORT WITH DUE PROCESS

The Eleventh Circuit's application of the rule of *Guthrie* in this case, does not comport with the Petitioner's Constitutional rights. "The right to prior notice and hearing is central to the Constitution's command of due process." *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 500 (1993). Nowhere in the Settlement Notice sent to all absent class members does it state that an unnamed class member must not only timely object in writing but also intervene for the purpose of preserving his or her right to appeal should the District Court not address adequately his objections. In addition, at the Settlement Hearing in which the Petitioner strongly objected to the disputed fees and expenses, neither the District Court nor Class Counsel raised the issue of intervention.

"When an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet*, 405 U.S. 56, 77 (1982) (citations omitted). "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). A party aggrieved by a final order of

the district court has standing to appeal such order. *Concorde Resources, Inc. v. Woosley (In re Woosley)*, 855 F.2d 687, 687-88 (10th Cir. 1988). "Although the determination of injury may not always be simple, standing to appeal is recognized if the appellant can show an adverse effect of the judgment . . .." Wright, *et al.*, 15A FEDERAL PRACTICE AND PROCEDURE § 3902, at 63 (2d ed. 1986).

28 U.S.C. § 1291 permits appellate jurisdiction to the courts of appeals from "all final decisions of the district courts," and it is firmly established that parties to a suit have an appeal as of right from an adverse decision of the district court. *Id.* In a non-class action proceeding, however, a settlement to which the parties agreed will never give rise to an "adverse decision" because the parties have all acquiesced to the compromise. Wright, *et al.*, 15A FEDERAL PRACTICE AND PROCEDURE § 3902, at 91-92 ("Parties who have consented to entry of a judgment at times are said to lack standing to appeal, and occasionally appeals from consent judgments are simply dismissed. The true principle at work, however, is one of waiver or consent; the appropriate disposition, if the appeal represents no more than a retroactive attempt to undo consent properly given, is affirmance rather than dismissal.") (*citing Pacific R.R. v. Ketchum*, 101 U.S. 289, 295 (1879)).

In a Rule 23(b)(3) class action, as the one at issue here, or in a Rule 23.1 shareholder derivative action, however, there is a strong chance that a settlement to which named parties have agreed will result in a sort of "adverse decision" to unnamed, non-negotiating parties. *See Bell*, 2 F.3d at 1310 ("In seeking court approval of their settlement proposal, plaintiffs' attorneys and defendants' interest coalesce and mutual interest may result in mutual indulgence. The parties can be expected to spotlight the proposal's strengths and slight its defects."). Thus, where an appellate court grants review to named parties, while denying standing to unnamed Rule 23(B)(3) or Rule 23.1 class members, would effectively violate the unnamed party's rights to seek review of an "adverse decision." *See Lindsey*, 405 U.S. at 77.

This Court has held that a "judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of *strangers* to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (emphasis added.) While the Court has recognized an "exception" for situations where the non-party is otherwise adequately represented, *Id.* at 762 n.2, only through an appeal and a substantive review of the district court's decision can an appellate court determine whether an unnamed Rule 23(B)(3) or Rule 23.1 class member has become a stranger *vis-a-vis* the settlement. To impose any other approach—like the one in *Guthrie*—would severely impair the due process rights of unnamed class members, whose timely and meritorious objections may be overlooked by a district court and ignore the teaching of the Federal Rules and the overwhelming case law.

CONCLUSION

For the reasons stated above, and to eliminate the split in the circuits, this Court in this case should grant Certiorari.

Respectfully submitted,

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(212) 421-5555

Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4006

May 9, 1995

In re SOUTHEAST BANKING CORP., SECURITIES LITIGATION

HARVEY WEINER, et al., a national banking association,

Plaintiffs-Appellees,

—v.—

SOUTHEAST BANKING CORP., CHARLES J. ZWICK, JOHN PORTA, G. DODSON MATHIAS, PAUL HILL, KIRSTEN M. HUDAK,

Defendants,

WILLIAM A. BRANDT, JR., as Administrator of the Investment Plus Plan of Southeast Banking Corp.,

Appellant.

Appeal from the United States District Court for the Southern District of Florida.

Before COX and BLACK, *Circuit Judges*, and FAY, *Senior Circuit Judge*.

PER CURIAM:

This appeal arises from a class action settled against Southeast Banking Corporation. The district court approved the settlement and was faced with the issue of attorneys's fees and costs. William A. Brandt, Jr., as administrator of a pension plan for former Southeast Bank employees, objected to the request for attorneys's fees by class counsel. The district judge overruled the objection and approved attorneys's fees of twenty-five percent of the settlement. Brandt attempts to appeal that ruling.

Brandt was not a named party. He never moved to intervene in the class action as administrator of the pension plan. Here, he attempts to base standing to appeal on his having objected to the request for attorneys's fees.

We find that our Circuit's precedent is clearly established in *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987). Brandt, a nonnamed class member who failed to intervene, lacks standing to appeal the district court's order on attorneys's fees. Accordingly, we dismiss the appeal.

APPEAL DISMISSED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Filed Nov. 24, 1993

MASTER FILE

CIVIL ACTION

No. 90-0760-CIV-MOORE

JURY TRIAL DEMANDED

IN RE: SOUTHEAST BANKING CORP.
SECURITIES LITIGATION

THIS DOCUMENT RELATES TO ALL ACTIONS

ORDER AND FINAL JUDGMENT

This proceeding (the "Litigation") consists of consolidated Class Actions brought by Class Representative Plaintiffs Harvey Wiener, William J. Hall, The Maynard Slessinger Trust, Paula P. Folkman, Gasper Sclafani, Myers L. Girsh and DCA Grantor Trust ("Plaintiffs") individually and as representatives of all Class Members (as hereinafter defined), against Defendants John D. Porta, Charles J. Zwick, Paul Hill, Kristen M. Hudak, Samuel A. Milne, Douglas E. Ebert and Florence Schust Bassett as Personal Representative of the Estate of Harry Hood Bassett (collectively referred to as the "Defendants").

On March 22, 1990, a class action complaint was filed in this court entitled *Harvey Wiener v. Southeast Banking Corp., et al.*, Civil Action No. 90-0760, on behalf of the named Plaintiff and all others similarly situated. Another class action was subsequently filed in this Court by Plaintiff Hall, entitled *William J. Hall v. Southeast Banking Corp., et al.*, Civil Action No. 90-0838.

On April 23, 1990, the actions were filed as one consolidated, amended complaint. Thereafter, on April 27, 1990, a Second Consolidated Amended Complaint was filed, and on or about July 18, 1990, upon the stipulation of the parties, Plaintiffs were granted leave to file a Third Consolidated Amended Complaint. In that Complaint, Plaintiffs, The Maynard Slessinger Trust and Paula B. Folkman, joined in the action, alleging purchases of Southeast Banking Corp. securities during the second quarter of 1990. After the filing of the Third Consolidated Amended Complaint, this cause proceeded through motion practice. On September 20, 1992, Southeast Banking Corp. filed a bankruptcy petition under Chapter 7 of the United States Bankruptcy Code. On November 7, 1991, Plaintiffs Wiener, Hall, The Maynard Slessinger Trust and Paula P. Folkman, previously Plaintiffs in this action, as well as Plaintiffs Gasper Sclafani, Myers L. Girsh and DCA Grantor Trust, who sought to join as Plaintiffs in this action, moved to file a Fourth Consolidated Amended and Supplemental Complaint. The proposed Fourth Consolidated Amended and Supplemental Complaint deleted Southeast Banking Corp. from the named Defendants and sought recovery, in addition to that sought in the Third Consolidated Amended Complaint, for those persons who purchased common stock and debentures of Southeast Banking Corp. subsequent to June 15, 1990 through July 3, 1991. On March 12, 1992, United States District Judge William J. Zloch granted Plaintiffs' motion to File a Fourth Consolidated Amended and Supplemental Complaint.

The Fourth Consolidated Amended and Supplemental Complaint, as amended by this Court's order of August 27, 1993,

alleges, *inter alia*, violations of federal law with respect to public disclosures and non-disclosures concerning the financial and operating condition and prospects of Southeast Banking Corp. during the period from February 27, 1989 through and including September 20, 1991. The defendants have denied the material allegations of the Fourth Consolidated Amended and Supplemental Complaint and any wrongdoing and any liability to Plaintiffs or to the Class they represent.

Pursuant to the Stipulation and Agreement of Settlement (the "Stipulation") dated August 19, 1993, all persons who purchased or otherwise acquired Southeast Banking Corp.'s publicly traded Securities including common stock, preferred stock, capital notes, notes, convertible subordinated debentures, non-convertible debentures, and/or securitized asset interests during the period from February 17, 1989 through and including September 20, 1991 (the "Class Period") are Class Members in connection with the above litigation. Excluded from the Class are Defendants, former officers and directors of Southeast Banking Corp., or any of their spouses, heirs, executors, administrators, successors and assigns. Plaintiffs' Lead Counsel, acting on behalf of the Class, has entered into the Stipulation and has applied to this Court for approval of the stipulation and the terms thereof pursuant to Rule 23(e) of the Federal Rules of Civil Procedure.

On August 27, 1993, an Order with Respect to Notice, Settlement Hearing and Administration was entered by this Court directing that notice be given to the Class of the proposed Settlement, and of a hearing to determine whether the proposed Stipulation and Settlement should be approved as fair, adequate and reasonable, to fix the fees and reimbursement of expenses of Plaintiffs' Counsel, and to consider individual awards to the named Plaintiffs, as well as to hear any objections thereto. Such a hearing was held, as noticed, on November 15, 1993. Prior to the Settlement Hearing, proof of notice, as directed in said Order, was presented and filed. Members of the Class were given the opportunity to submit Requests for Exclusion from the Class on or before October

18, 1993 (which deadline was extended by further stipulation and Order of this Court to 5:00 p.m., November 9, 1993) and a statement listing the persons who have timely filed such Requests for Exclusion has been filed with the Court. Members of the Class were also notified of their right to appear at the hearing in support of or in opposition to the proposed Settlement and award of fees and reimbursement of expenses.

The Court having heard Plaintiffs' Lead Counsel, on behalf of Plaintiffs and the Class, and Defendants' Representative Counsel, Lewis F. Murphy, P.A. of Steel Hector & Davis, and Robert T. Wright, Jr. of Mershon, Sawyer, Johnston, Dunwody & Cole, on behalf of Defendants, and having reviewed all of the submissions presented with respect to the proposed Settlement, and the Court having determined that the Settlement is fair, adequate and reasonable and that it is in the best interests of the Class to consummate the Settlement in accordance with the provisions of the Stipulation, and having considered the Petition of Plaintiffs' Counsel for awards of fees and reimbursement of expenses and awards to the named Plaintiffs and having reviewed the affidavits, schedules and exhibits submitted in support thereof, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

1. The Court has subject matter jurisdiction over this action.

2. The Court incorporates herein by reference the definitions set forth in the Stipulation of Settlement.

3. Notice to the Class required by Rules 23(c) and (e) of the Federal Rules of Civil Procedure has been given in an adequate and sufficient manner, constituting the best notice practicable, complying in all respects with such Rules and due process, including, but not limited to, the forms of notice and the methods of identifying and giving notice to the Class;

4. The members of the Class ("Class Members") are as described above, including their spouses, heirs, executors, administrators and assigns, if any, but excluding all persons

who timely filed a request to be excluded from the Class pursuant to Rule 23(c)(2) of the Federal Rules of Civil Procedure as listed on Exhibit A hereto, and whose exclusion is hereby approved.

5. The proposed Settlement (as provided for in the Stipulation, dated August 19, 1993) is in all respects fair, adequate, reasonable and proper and in the best interests of the Class, and is approved. The Court also finds that payment by National Union of the Settlement Funds under the Policy is in good faith, although it will deplete the Policy. Such payment is hereby authorized and approved by the Court.

6. Plaintiffs, Class Members and the Defendants shall consummate the Settlement according to the terms of the Stipulation.

7. The persons who have timely requested exclusion from the Class shall not participate in the proceeds of the Settlement hereby approved or receive any benefit thereunder, and are not bound by this Order.

8. Plaintiffs and each and every Class Member are permanently barred and enjoined from asserting either directly or indirectly, individually or in a representative capacity, any Released Claim and/or any claim, right, demand or cause of action which could have been asserted based upon a Released Claim, against Defendants or any Released Party.

9. This Litigation is dismissed with prejudice and on the merits and without award of court costs, and all Released Claims, as defined in the Stipulation, are hereby extinguished.

10. Jurisdiction is hereby retained as to matters relating to the administration, consummation, enforcement and interpretation of the Settlement only. This limited retention of jurisdiction to administer the Settlement shall in no way affect the finality of this judgment with respect to any matter in this Order. This Order is final and appealable in all respects.

11. Neither this Final Judgment nor the Stipulation of Settlement are an admission or concession by any of the Defendants of any actual or potential fault, omission, liability or wrongdoing. This Judgment is not a finding as to the validity or invalidity of any claims in the Litigation or of any wrongdoing by any of the Defendants. Neither this Judgment nor the Stipulation nor the fact of settlement, nor the settlement proceedings, nor the settlement negotiations, nor any related document shall be used as an admission of any actual or potential fault or omission by any person, nor offered or received in evidence as an admission, concession, presumption or inference against any party in any proceeding, except that the Stipulation may be offered as evidence in any proceeding to enforce the Stipulation.

12. Plaintiffs' Lead Counsel, on behalf of all Plaintiffs' Counsel, are awarded the sum of $1,250,000.00 as legal fees and $98,859.57 as reimbursement of their costs and out-of-pocket expenses to date. Such fees shall be allocated by Plaintiffs' Lead Counsel among those plaintiffs' counsel who have contributed to the Settlement in such proportion as Plaintiffs' Lead Counsel determines is fair and equitable.

13. Each of the named Plaintiffs is awarded the sum of $2,000.00 over and above their respective shares of the Settlement Fund.

14. This Order and Final Judgment, and the Stipulation upon which it is based, shall apply to any claims which have been or could be brought by Class Members, individually (including the equitable right to demand and to seek to pursue any derivative claim on behalf of Southeast Bank, N.A. and Southeast Bank of West Florida). However, this Order and Final Judgment, and the Stipulation upon which it is based, shall not apply to any claims which have been or could be brought by the Federal Deposit Insurance Corporation, for any alleged injury to Southeast Bank, N.A. and Southeast Bank of West Florida.

15. This Order and Final Judgment, and the Stipulation upon which it is based, shall apply to any claims which have been or could be brought by Class Members, individually (including the equitable right to demand and to seek to pursue any derivative claim on behalf of Southeast Banking Corporation). However, this Order and Final Judgment, and the Stipulation upon which it is based, shall not apply to any claims which have been or could be brought by William A. Brandt, Jr., as Trustee of Southeast Banking Corporation, for any alleged injury to Southeast Banking Corporation.

ENTERED this 23rd day of November, 1993.

/s/ KEVIN MICHAEL MOORE
Honorable Kevin Michael Moore
United States District Judge

cc: To All Counsel of Record

LFM:sd/1491

EXHIBIT "A"

SHAREHOLDERS' REQUESTS FOR EXCLUSION
IN RE: SOUTHEAST BANKING CORPORATION
SECURITIES LITIGATION
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA,
MIAMI DIVISION
CASE NO. 90-0760-CIV-MOORE

Name, Address	*Letter Dated*
Kenneth F. Palmer Susan F. Palmer Jt Ten. 104 Lynwood Avenue Titusville, FL 32796-3214	09/27/93
Lester Fredel 655 Island Road Bay Point Miami, FL 33137-3324	10/01/93
Mary Ethel Tucker (deceased) and Jane G. Clenney, Joint Tenants 4055 Myra Street Jacksonville, FL 32205	10/08/93
American Pioneer, Inc. by Bernard M. Brodsky Counsel, RTC/PLS Resolution Trust Corporation 1717 H Street, N. W. Washington, D. C. 20006	10/12/93

Name, Address	*Letter Dated*
I. Fred Fredel 4000 Towerside Terrace Tower IV, Apt. 1601 Miami, FL 33138-2235	10/08/93
Orlando A. Baro 306 Apache Trail Brandon, FL 33511	10/11/93
Hector M. Esteve 201 Crandon Blvd., Apt. 328 Key Biscyane, FL 33149	10/15/93
Franicis W. and Mary Ellen Raynes, Jt. Ten. Post Office Box 380 Oakfield, Maine 04763	10/12/93
Gilliam D. Bentley, Sr. Post Office Box 7446 Marietta, GA 30065-1446	10/16/93
Surfboard & Co. nominee name for California Public Employees' Retirement System 1 Enterprise Drive North Quincy, MA 02071	10/15/93

1461/10/21/93

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4006

Filed July 19, 1995

IN RE: SOUTHEAST BANKING CORP.,
SECURITIES LITIGATION.

HARVEY WEINER, et al., a national banking association,

Plaintiffs-Appellees,

versus

SOUTHEAST BANKING CORP., CHARLES J. ZWICK, JOHN PORTA, G. DODSON MATHIAS, PAUL HILL, KIRSTEN M. HUDAK,

Defendants,

WILLIAM A. BRANDT, JR., as Administrator of the Investment Plus Plan of Southeast Banking Corp.,

Appellant.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: COX and BLACK, *Circuit Judges*, and FAY, *Senior Circuit Judge*.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ EDWARD R. COX
United States Circuit Judge

ORD-42
(9/91)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MASTER FILE
Filed August 20, 1993

CIVIL ACTION NO. 90-0760-CIV-MOORE

IN RE: SOUTHEAST BANKING CORP.
SECURITIES LITIGATION

THIS DOCUMENT RELATES TO ALL ACTIONS

STIPULATION OF SETTLEMENT

WHEREAS, on March 22, 1990, a class action complaint, captioned *Harvey Wiener, etc. v. Southeast Banking Corp., et al.*, Civil Action No. 90-0760, was filed in this Court against Southeast Banking Corporation ("Southeast Banking Corp.") and certain named and unnamed officers, directors, attorneys, accountants and advisors alleging, *inter alia*, violations of federal law with respect to public disclosures and non-disclosures concerning the financial and operating condition and prospects of Southeast Banking Corp.; and

WHEREAS, on March 27, 1990, a second class action, captioned *William J. Hall, etc. v. Southeast Banking Corp., et al.*, Civil Action No. 90-0838, was filed in this Court against Southeast Banking Corp. and certain named and unnamed

officers, directors, attorneys, accountants and advisors alleging, *inter alia*, violations of federal and state law with respect to public disclosures and non-disclosures concerning the financial and operating condition and prospects of Southeast Banking Corp.; and

WHEREAS, on April 23, 1990, plaintiffs Wiener and Hall entered into a stipulated pretrial order consolidating their complaints under the caption "*In re: Southeast Banking Corp. Securities Litigation*," Case No. 90-0760-CIV (the "Litigation"); and

WHEREAS, as part of that stipulation, the law firm of Greenfield & Chimicles (succeeded by and hereinafter referred to as Chimicles, Burt, Jacobsen & McNew), the law firm of Stull, Stull & Brody and the Law Offices of Joseph H. Weiss were designated as Plaintiffs' Lead Counsel; and

WHEREAS, on April 23, 1990, a consolidated amended complaint was filed in the Litigation; and

WHEREAS, on April 27, 1990, a second consolidated amended complaint was filed in the Litigation in order to correct an inaccuracy in the description of plaintiff Hall's securities; and

WHEREAS, defendants moved to dismiss the second consolidated amended complaint; and

WHEREAS, before any ruling was made on defendants' motion to dismiss the second consolidated amended complaint, plaintiffs on July 11, 1990 served a third consolidated amended complaint, which extended the class period and added plaintiffs The Maynard Slessinger Trust and Paula P. Folkman; and

WHEREAS, defendants also moved to dismiss the third consolidated amended complaint; and

WHEREAS, after a hearing, Magistrate Judge Linnea Johnson issued a Report and Recommendation on June 26, 1991

recommending dismissal *of the third consolidated amended* complaint; and

WHEREAS, on July 11, 1991, plaintiffs' counsel filed objections to and moved to vacate the Magistrate's Report, which objections and motion were never ruled on; and

WHEREAS, On September 19, 1991, the Comptroller of the Currency declared insolvent Southeast Banking Corp.'s principal subsidiary banks, Southeast Bank, N.A. ("Southeast Bank") and Southeast Bank of West Florida, and appointed the Federal Deposit Insurance Corporation (the "FDIC") as Receiver of these banks; and

WHEREAS, on September 20, 1991, Southeast Banking Corp. filed for liquidation under Chapter 7 of the U.S. Bankruptcy Code; and

WHEREAS, on March 12, 1992, the Court entered an order granting plaintiffs' motion for leave to file a fourth consolidated amended and supplemental complaint alleging, *inter alia*, violations of federal law with respect to public disclosures and non-disclosures concerning the financial and operating condition and prospects of Southeast Banking Corp. through July 3, 1991, adding plaintiffs Gasper Sclafani, Myers L. Girsh and D.C.A. Grantor Trust, adding certain additional officer and/or director defendants, and dropping defendant Southeast Banking Corp. as a party defendant; and

WHEREAS, on June 16, 1992, the Trustee in Bankruptcy for Southeast Banking Corp. initiated an action against certain of the Defendants herein, and other former officers and directors of Southeast Banking Corp., alleging mismanagement and breaches of fiduciary duty, in an action styled *William A. Brandt Jr. v. Florence S. Bassett, et al.*, Case No. 92-1600-CIV-Aronovitz (the "Trustee Suit"); and

WHEREAS, on September 4, 1992, the FDIC moved to intervene in the Trustee Suit asserting that any claims that exist for mismanagement and breaches of fiduciary duty would be solely and exclusively the rights of the FDIC; and

WHEREAS, the FDIC's motion to intervene was granted; and

WHEREAS, subsequent to the FDIC's intervention in the Trustee Suit, both the FDIC and the Trustee moved for summary judgment on the issue of ownership of the claims; and

WHEREAS, both the Trustee and FDIC have asserted claims in excess of the amount of the available directors and officers liability insurance and each claim is viewed by Plaintiffs' Lead Counsel as a competing claim to the claims asserted on behalf of the Class in the Fourth Amended Complaint; and

WHEREAS, on April 29, 1993, United States Magistrate Linnea R. Johnson recommended that the Trustee Suit be dismissed, and that the FDIC's motion for summary judgment as to the ownership of the claims be granted; and

WHEREAS, Plaintiffs' Lead Counsel thereafter attempted to explore a coordinated prosecution of the class claims and the FDIC claims, with an appropriate allocation of the recovery to the Class; and

WHEREAS, those efforts failed, and it became apparent to Plaintiffs' Lead Counsel that the FDIC intends to prosecute its claim as a competing claim to the Class action; and

WHEREAS, on July 21, 1993 United States District Judge Sidney M. Aronovitz entered an order adopting that portion of Magistrate Johnson's report which affirms the FDIC's right to pursue any definitive claims which may be brought against, among others, the Defendants herein; and

WHEREAS, Judge Aronovitz' order allows the Trustee to pursue certain direct claims against, among others, the Defendants herein; and

WHEREAS, on May 4, 1993, the Resolution Trust Corporation ("RTC"), acting as the receiver for American Pioneer Savings Bank also filed a suit against, inter alia, the Defendants in this action, alleging violations of federal securities laws in relation to Southeast; and

WHEREAS, the RTC's suit is also a competing claim to the Class action; and

WHEREAS, on August 14, 1992, plaintiffs moved for the entry of an order certifying them as representatives of a class of all persons who purchased Southeast Banking Corp.'s publicly traded common stock, convertible subordinated debentures, and non-convertible debentures during the period of February 27, 1989 through and including July 3, 1991, excluding the Defendants, members of their immediate families, their successors and assigns; and

WHEREAS, Defendants have again moved to dismiss the Litigation, and this motion is under advisement by this Court; and

WHEREAS, in the months following the filing of the aforementioned complaints, counsel for the plaintiffs, by and through Plaintiffs' Lead Counsel and experts consulted by them, have conducted a thorough examination into and evaluation of the law and facts relating to the matters set forth in the fourth consolidated amended and supplemental complaint, in order to determine how best to confer a substantial benefit upon the Class (defined below), in light of the obstacles to and risks of establishing liability and damages; and

WHEREAS, based upon their discovery, investigation and evaluation of the facts and law relating to the matters set forth in the fourth consolidated amended and supplemental complaint, Plaintiffs' Lead Counsel after conferring with other plaintiffs' counsel has concluded that, irrespective of any merit to the claims asserted in the fourth consolidated amended and supplemental complaint, there are substantial obstacles to collecting any judgment that may be obtained; and

WHEREAS, Plaintiffs' Lead Counsel has concluded that this Stipulation confers a substantial benefit upon the Class, and that it is in the best interests of the Class to settle the Litigation in accordance with the terms of this Stipulation; and

WHEREAS, plaintiffs, after considerable arm's length negotiations, have agreed to settle the Litigation, pursuant to the provisions of this Stipulation, after considering: (*i*) the substantial benefits that plaintiffs and the other members of the Class will receive from this Stipulation; (*ii*) the attendant risks of litigation, especially in complex actions such as this, as well as the difficulties and delays inherent in such litigation; (*iii*) the uncertainty relating to the proof of the allegations included in the fourth consolidated amended and supplemental complaint; (*iv*) the uncertainty inherent in the various theories of damage which could be employed assuming liability can be established; (*v*) the limitations on obtaining and collecting any judgment in light of the bankruptcy of Southeast Banking Corp.; (*vi*) the claims of the Trustee, the RTC, and the FDIC against Southeast Banking Corp. and Southeast Bank and their respective directors and officers (including the competing claims for proceeds from the liability insurance policies obtained by Southeast Banking Corp.); (*vii*) the desirability of permitting this Stipulation to be promptly consummated according to its terms; and (*viii*) the conclusion of Plaintiffs' Lead Counsel that resolution of the Litigation is in the best interests of the Class; and

WHEREAS, Defendants deny the material allegations of the fourth consolidated amended and supplemental complaint and deny any and all liability with respect to any and all facts and claims alleged or which could have been alleged in this Litigation but consider it desirable that the Litigation be settled and dismissed because the Stipulation will: (*i*) halt the substantial expense, inconvenience and uncertainties associated with continued litigation of Plaintiffs' claims; (*ii*) finally put to rest those claims; and (*iii*) confer a substantial benefit upon Defendants including, without limitation, coverage under existing policies and the avoidance of further expense and disruption due to the pendency of the Litigation; and

WHEREAS, as a result of extensive arm's length negotiations between counsel and, in consideration of the matters

noted above, Plaintiffs and Defendants and their respective counsel have concluded that the terms of the Settlement are fair, reasonable, adequate and in the best interests of the Plaintiffs, Defendants, and the Class.

NOW, THEREFORE, IT IS HEREBY STIPULATED, CONSENTED AND AGREED, by and among plaintiffs, Harvey Wiener, William J. Hall, The Maynard Slessinger Trust, Paula P. Folkman, Gasper Sclafani, Myers L. Girsh and DCA Grantor Trust, individually and as representatives of all Class Members, as defined below ("Plaintiffs"), and defendants John D. Porta, Charles J. Zwick, Paul Hill, Kristen M. Hudak, Samuel A. Milne, Douglas E. Ebert and Florence Schust Bassett as Personal Representative of the Estate of Harry Hood Bassett (collectively referred to as "Defendants"), by their respective duly authorized counsel, subject to the approval of the United States District Court for the Southern District of Florida (the "Court") pursuant to Rule 23 of the Federal Rules of Civil Procedure, as follows:

A. *Definitions*

1. As used in this Stipulation and the related documents annexed hereto as Exhibits (the terms, conditions and benefits of which are incorporated herein by reference) the following terms shall have the meanings set forth below:

a. "Attorneys' Fees and Expenses" means the portion of the Settlement Funds to be paid to Plaintiffs' Lead Counsel on behalf of all plaintiffs' counsel for fees and costs, including attorneys' fees, the fees and costs of experts and consultants, and other fees and costs in any way associated with this Litigation;

b. "Authorized Claimant" means a Claimant whose claim has been allowed as provided by the terms of this Stipulation and the Final Order and Judgment;

c. "Claimant" means any Class Member who files a Proof of Claim in such manner and within such time as the Court shall prescribe;

d. The "Class" and "Class Members" mean all persons who purchased or otherwise acquired Southeast Securities during the Class Period (based upon transaction date), including their spouses, heirs, executors, administrators, successors and assigns, if any, except that "Class" and "Class Members" do not include (i) Defendants, the former officers and directors of Southeast, or any of their spouses, heirs, executors, administrators, successors and assigns; or (ii) persons who have properly excluded themselves from the Class by mailing a request for exclusion within the time required and otherwise in compliance with the Order Certifying A Settlement Class (Exhibit A-1) and Order with Respect to Notice, Settlement Hearing and Administration (Exhibit A-2), and who are recognized by the Court as having properly excluded themselves from the Class.

e. "Class Period" means the period from February 27, 1989, through and including September 20, 1991;

f. "Court" means the United States District Court for the Southern District of Florida;

g. "Date of Distribution" means the date on which the Settlement Administrator shall mail to Authorized Claimants checks representing their proportionate shares of the Net Settlement Funds. The Date of Distribution shall be as soon as practicable after the Settlement Effective Date, but at least thirty (30) days after the Settlement Effective Date;

h. "Defendants" means defendants John D. Porta, Charles J. Zwick, Paul Hill, Kristen M. Hudak, Samuel A. Milne, Douglas E. Ebert and Florence Schust Bassett as Personal Representative of the Estate of Harry Hood Bassett;

i. "Defendants' Representative Counsel" means the law firms of Steel Hector & Davis and Mershon, Sawyer, Johnston, Dunwody & Cole;

j. "Excess Distribution" means any payment of Settlement Funds into the Notice and Administration Fund in excess of the initial $100,000 payment provided for in paragraph B.3.a. below;

k. "Hearing Order" means the order annexed hereto as Exhibit A-2.

l. "Individual Awards to Named Plaintiffs" means the amount as approved by the Court, if any, awarded from the Settlement Funds to each Named Plaintiff;

m. "National Union" means National Union Fire Insurance Company of Pittsburgh, Pennsylvania and/or A.I. Management and Professional Liability Claim Adjusters, which entity has the power and authority to bind National Union;

n. "Net Settlement Funds" means the Settlement Funds, plus any interest earned or accrued thereon, less (*i*) Attorneys' Fees and Expenses as authorized for recovery by the Court from the Settlement Funds; (*ii*) the Notice and Administration Fund; (*iii*) taxes that may become due, if any, with respect to the Settlement Funds; (*iv*) any other related fees and expenses, including additional Notice and Administration Expenses, as may be authorized by this Stipulation or the Court; and (*v*) any Court-authorized Individual Awards to Named Plaintiffs;

o. "Nominees" means brokerage firms, banks, and other institutions who held Southeast Securities in street names or other similar fashion for the benefit of another during the Class Period;

p. "Notice" means the Notice of Pendency of Class Action, Proposed Settlement of Class Action, Settlement Hearing, and Right to Appear, substantially in the form of Exhibit B hereto;

q. "Notice and Administration Expenses" means and shall include the reasonable and verifiable costs associated with administration of the Settlement, including the costs associated with identifying and notifying Class Members, the printing and mailing of the Notice, the publication of any Summary Notice, reviewing and processing Proofs of Claim, assisting the making of claims, soliciting revocation of requests for exclusion, and fees and expenses payable to the Settlement Administrator or any depository institution, but excluding (i) any fees, expenses or disbursements of Plaintiffs' Lead Counsel, or other plaintiffs' counsel, or of any experts retained by Plaintiffs; and (ii) Individual Awards to Named Plaintiffs;

r. "Notice and Administration Fund" means $100,000 and such other portion of the Settlement Funds paid to Plaintiffs' Lead Counsel pursuant to paragraph B.3 below, which amount is to be held by Plaintiffs' Lead Counsel in a segregated, interest-bearing account, and utilized by Plaintiffs' Lead Counsel to pay initial Notice and Administration Expenses;

s. "Payable Claim" means the amount allocated to each Authorized Claimant pursuant to the terms of this Stipulation and the Final Judgment and Order;

t. "Plaintiffs' Lead Counsel" means the law firms of Chimicles, Burt, Jacobsen & McNew; Stull, Stull & Brody; and the Law Offices of Joseph H. Weiss;

u. "Proof of Claim" means a proof of claim form in substantially the form attached hereto as Exhibit C and as approved by the Court;

v. "Policy" means that certain Directors and Officers Liability and Corporate Reimbursement Policy No. 435-03-66 issued by National Union.

w. "Released Claims" means (i) any and all claims, actions or causes of action, rights or liabilities, including Unknown Claims, which have existed, exist, or may in the future exist against any Released Party by reason of any matter, cause or

thing whatsoever, arising out of, or relating to the offer, purchase, acquisition, sale, transfer, retention or exchange of Southeast Securities, by a Class Member; and (ii) any and all claims, actions, causes of action, rights or liabilities, including Unknown Claims, which a Class Member had, has, or may in the future have that are or could have been alleged in the Litigation arising out of, or relating to any acts, omissions, or failures to act of any of the Released Parties, individually or in their capacities as officers, directors, shareholders, employees, agents, consultants, attorneys, auditors, accountants, representatives, insurers, reinsurers, actuaries, underwriters, commercial or investment bankers, investors, affiliates, independent contractors, associates, and/or advisors of Southeast;

x. "Released Parties" means the Defendants, and their respective spouses, heirs, executors, administrators, successors and assigns; National Union and any other insurers that provide directors' and officers' liability insurance to Southeast, and their directors and officers; and all former officers, directors, employees, agents, attorneys, auditors, accountants, representatives, advisors, insurers, reinsurers, actuaries, underwriters, commercial or investment bankers, investors, consultants, affiliates, independent contractors and associates (as defined in SEC Rule 12b-2, promulated pursuant to the Securities Exchange Act of 1934) of Southeast and their respective spouses, heirs, executors, administrators, successors and assigns, except that any Class Member who files a Proof of Claim seeking to benefit from the Settlement Funds shall not be a Released Party;

y. "Settlement Administrator" means and shall be the firm of Rudolph, Palitz, Certified Public Accountants, 620 West Germantown Pike, Suite 400, Plymouth Meeting, Pennsylvania 19462;

z. "Settlement Effective Date" means the date by which all of the following conditions have occurred:

i. final approval by the Court of the Settlement;

ii. entry of the Final Order and Judgment thereon;

iii. expiration of the time for appeal for such Final Order and Judgment or, if any appeal is taken, the expiration of three days after final determination, not subject to further review, appeal or petition for rehearing, of such appeal by the highest court before which appellate review is or could be sought;

iv. final resolution of such appeal, if any, and entry of a final judgment in such manner as to permit the consummation of this Settlement in accordance with all of its terms and conditions, not subject to termination as a result of the contingencies set forth in this Stipulation;

aa. "Settlement Funds" means $5,000,000 in cash, plus interest accrued thereon, to be paid by National Union under the Policy and on behalf of Defendants pursuant to paragraphs B.2.a and B.3 hereof. Interest shall accrue at a rate of 2.5% per annum (simple interest) on that portion of the Settlement Funds not distributed to Plaintiffs' Lead Counsel for Notice and Administration Expenses, from the date of the Court's Hearing Order preliminarily approving this Stipulation until payment of all remaining Settlement Funds to the Settlement Administrator in accordance with paragraph B.2 below, provided that if the Stipulation or Settlement is terminated by Plaintiffs' Lead Counsel, Defendants' Representative Counsel or National Union as provided herein, no interest shall accrue on the Settlement Funds;

ab. "Settlement Hearing" means the hearing to be held by the Court to consider final approval of the Settlement pursuant to Fed. R. Civ. P. 23;

ac. "Stipulation" and/or "Settlement" mean this Stipulation of Settlement and the Exhibits attached hereto and incorporated herein by reference;

ad. "Southeast Securities" and/or "Southeast's Securities" mean any and all securities issued by Southeast and publicly

traded during the Class Period, including but not limited to common stock, preferred stock, capital notes, notes, convertible subordinated debentures, non-convertible debentures and/or securitized asset interests;

ae. "Southeast" means Southeast Banking Corp. and its present or former corporate parents, subsidiaries (including Southeast Bank), predecessors, successors, and assigns;

af. "Southeast Bank" means Southeast Bank, N.A.;

ag. "Summary Notice" means the printed summary of the Notice, to be published substantially in the form of Exhibit D in accordance with this Stipulation;

ah. "Termination Date" means the date on which a party to this Stipulation sends written notice of termination as provided herein; and

ai. "Unknown Claims" means any existing or future claims, demands, causes of action or rights, against any Released Party that the Class Members do not know or suspect to exist in their favor at the time the Final Order and Judgment is entered in this litigation, provided that such claim(s) would arise out of, or relate to Southeast, including the offer, purchase, acquisition, sale, transfer, retention or exchange of Southeast's Securities.

2. All other capitalized terms used herein shall have the meaning ascribed to them by this Stipulation.

B. *The Settlement*

1. The obligations incurred pursuant to this Stipulation shall be in full and final disposition and settlement of any and all Released Claims (whether assertable on behalf of the Class or individual Class Members) against the Released Parties by Plaintiffs and the Class Members, or any of them.

2. Within ten (10) business days following the Settlement Effective Date, National Union shall pay on behalf of Defen-

dants and pursuant to the Policy, by check made to the order of the Settlement Administrator, the Settlement Funds, less any amount already paid by National Union to Plaintiffs' Lead Counsel for Notice and Administration Expenses.

3. a. Within ten (10) business days after preliminary approval of the Stipulation by the Court in its Hearing Order, National Union shall pay, by check made payable to Chimicles, Burt, Jacobsen & McNew, on behalf of Defendants pursuant to the Policy, $100,000 of Settlement Funds, to establish the Notice and Administration Fund for initial Notice and Administration Expenses. The costs of administering the Settlement and the Settlement Funds shall be charged solely against the Settlement Funds, including the Notice and Administration .Fund, as provided for herein.

b. Plaintiffs' Lead Counsel shall disburse funds from the Notice and Administration Fund in payment of reasonable Notice and Administration Expenses authorized hereunder which are incurred in connection with carrying out the terms and conditions of the Stipulation. Plaintiffs' Lead Counsel shall be responsible for maintaining accurate records of all expenditures made for such purposes.

c. Plaintiffs' Lead Counsel shall be authorized to withdraw funds from the Notice and Administration Fund to pay Notice and Administration Expenses up to a maximum of $100,000 (plus accrued interest), without further approval of the Court or any other signatory to this Stipulation. To the extent that such costs do not exceed $100,000, plus interest earned thereon, any amount remaining unexpended shall be held by Plaintiffs' Lead Counsel and added to the amount of Settlement Funds paid to the Settlement Administrator pursuant to paragraph B.2 hereof.

d. To the extent Notice and Administration Expenses exceed the amount available in the Notice and Administration Fund, Plaintiff's Lead Counsel may request the transfer of additional Settlement Funds into the Notice and Administration Fund (an "Excess Distribution"). Any such request

shall be (i) made in a minimum amount of $10,000 per request; (ii) accompanied by invoices or other appropriate documentation and a reasonable explanation of the basis for the request; and (iii) made to National Union if the request is made prior to the Settlement Effective Date; or (iv) made to the Court if the request is made after the Settlement Effective Date.

e. Any request for an Excess Distribution made prior to the Settlement Effective Date must be approved by National Union, which approval shall not unreasonably be withheld. If a disagreement arises between National Union and Plaintiffs' Lead Counsel regarding an Excess Distribution, the matter may be submitted to the Court for resolution by either party, and both parties shall be bound by the Court's ruling.

f. After the Settlement Effective Date, Plaintiffs' Lead Counsel may request that the Court approve additional Excess Distributions. The Settlement Administrator shall make any distribution of Settlement Funds into the Notice and Administration Fund approved by the Court.

4. In the event that Settlement Funds are not paid as required by paragraphs B.2 or B.3.a above, Plaintiffs' Lead Counsel shall have the unilateral option to terminate the Settlement by sending a notice, in writing, by telecopy and overnight express mail, to Defendants' Representative Counsel and National Union.

5. a. If the Settlement does not become effective as defined below, or is terminated by Plaintiffs' Lead Counsel, Defendants' Representative Counsel or National Union as provided herein, Plaintiffs' Lead Counsel shall transfer to National Union, by wire transfer within ten (10) business days after the Termination Date, such funds as are then remaining in the Notice and Administration Fund, including interest earned thereupon, after all out-of-pocket paid or accrued expenditures for Notice and Administration Expenses have been deducted therefrom.

b. National Union shall have no obligation to pay Settlement Funds hereunder to Plaintiffs' Lead Counsel or otherwise, upon the occurrence of the Termination Date. However, this paragraph B.5.b shall not be construed to require Plaintiffs' Lead Counsel to reimburse National Union for Settlement Funds previously expended (paid or accrued) for Notice and Administration Expenses at the time of the Termination Date, as set forth in paragraph B.5.a above.

6. The amount of Attorneys' Fees and Expenses, as determined by the Court at the Settlement Hearing or thereafter, paid from the Settlement Funds by the Settlement Administrator by wire transfer and in the amount determined by the Court, together with accrued interest thereon, beginning on the date of such determination by the Court, within three (3) business days after the Settlement Funds are transferred by National Union to the Settlement Administrator as provided in paragraph B.2 above. Except to the extent that the Court authorizes the use of Settlement Funds for the payment of Attorneys' Fees and Expenses, the Defendants and National Union shall have no obligation whatsoever with respect to any attorneys' fees or other expenses of Plaintiffs' Lead Counsel, other plaintiffs' counsel, counsel for any Class Member or any experts retained on behalf of Plaintiffs or Class Members, or any other costs, fees and/or expenses whatsoever of any party to this litigation or any Class Member.

7. Prior to distribution of the Net Settlement Funds to Authorized Claimants, Plaintiffs' Lead Counsel shall seek and obtain authorization from the Court for distribution of the Net Settlement Funds, as well as for the payment of any remaining expenses chargeable against the Settlement Funds.

8. As soon as practicable after this Stipulation has been executed, the parties shall jointly apply to the Court for an Order with Respect to Class Certification (substantially in the form attached hereto as Exhibit A-1) and an Order with Respect to Notice, Settlement Hearing and Administration

(substantially in the form attached hereto as Exhibit A-2) (the "Hearing Order"), which Orders shall provide, *inter alia*, as follows:

a. Certifying a Class, solely for purposes of settlement, consisting of all persons who purchased or otherwise acquired Southeast Securities during the Class Period.

b. Directing that a Settlement Hearing be held no sooner than 75 days after the date of the Hearing Order. Such Settlement Hearing shall be held for the purpose of determining whether the Settlement and Stipulation should be approved as fair, reasonable, adequate, and in the best interests of the Class, and whether judgment should be entered dismissing the Litigation on the merits and with prejudice in accordance with the terms of this Stipulation; and in the event that the Court approves this Settlement, to pass upon the application of Plaintiffs' Lead Counsel for Attorneys' Fees and Expenses, and the application for Individual Awards to Named Plaintiffs; and to hear and determine such other matters as the Court may deem appropriate;

c. Providing that notice of this Settlement and of the Settlement Hearing be given at the direction of the Court to all persons who are members of the Class, as follows:

i. Requiring that notice to all Class members shall be given by Plaintiffs' Lead Counsel by mailing a copy of the Notice, substantially in the form attached hereto as Exhibit B, and the Proof of Claim and Release ("Proof of Claim"), substantially in the form attached hereto as Exhibit C, to the addresses appearing on such records previously maintained by Southeast's former transfer agent, or such other entity presently maintaining such records, and reasonably made available to Plaintiffs' Lead counsel;

ii. Requiring that notice to Class Members shall also be provided by directing Plaintiffs' Lead Counsel to publish a Summary Notice substantially in the form annexed hereto as

Exhibit D. The Summary Notice shall be published once each in the national editions of *The Wall Street Journal* and in the business section of the *Miami Herald*, approximately one week following the mailing of the Notice;

d. Requiring the filing of a sworn statement by Plaintiffs' Lead Counsel or his designee, prior to the Settlement Hearing, or mailing of the Summary Notice as required in the Hearing Order;

e. Determining that the notices described in paragraph B.8.c. above constitute the best notice practicable under the circumstances and constitute due and sufficient notice of the Settlement Hearing and proposed Settlement to all persons affected by and/or entitled to participate in the Settlement;

f. Providing that under no circumstances shall the Defendants, their counsel or their insurers be required to give or fund, other than by payment of the Settlement Funds, any Notice to the Class Members, including the notice contemplated in the Hearing Order;

g. Providing that, for settlement purposes only, the allegations in Plaintiffs' Fourth Consolidated Amended and Supplemental Complaint relating to the Class and Class Period shall be deemed amended by interlineation to be consistent with the definitions in this Stipulation;

h. Granting, for purposes of settlement only, Plaintiffs' motion to substitute the Estate of Harry Hood Bassett as a party defendant for Harry Hood Bassett; and

i. Providing for the other matters set forth in Exhibit A-2.

C. *Processing and Determination of Claims*

1. For purposes of determining the extent, if any, to which a Class Member shall be an Authorized Claimant, the following conditions shall apply:

a. Each Class Member shall be required to submit a Proof of Claim supported by such documents as are specified therein, or such additional documents or proof as Plaintiffs' Lead Counsel or the Settlement Administrator, in their discretion, may deem necessary.

b. All Proofs of Claim must be submitted to the Settlement Administrator by the date specified in the Proof of Claim unless such period is extended by Order of the Court. Any Class Member who is not entitled to file a Proof of Claim or who fails to file a Proof of Claim by such date shall be forever barred from receiving any payment pursuant to this Stipulation or the Final Order and Judgment (unless, by Order of the Court, a later filed Proof of Claim by such Class Member is approved prior to the Date of Distribution) but shall in all other respects be bound by the terms of this Stipulation and by the contained herein and the Final Order and Judgment entered in the Litigation. A Proof of Claim must be received by the Settlement Administrator or postmarked on or before the date specified in the Notice in order to be deemed timely.

c. Each Proof of Claim shall be submitted to and reviewed by the Settlement Administrator who shall determine, under the supervision of Plaintiffs' Lead Counsel, and in accordance with this Stipulation and the Hearing Order, the extent, if any, to which each claim shall be allowed (the "Recognized Loss"), subject to final review by the Court. Copies of submitted Proofs of Claim shall be made available to Defendants' Representative Counsel for examination at their expense and upon their request. Following the Date of Distribution, the Settlement Administrator shall retain all Proofs of Claim and other related documents for a period of one (1) year, at which time all Proofs of Claim and other related documents may be destroyed or, at their expense and option, delivered to Defendants.

d. The Settlement Administrator shall reject Proofs of Claim that do not meet the requirements set forth herein and in the Hearing Order. The Settlement Administrator shall

notify all Claimants whose Proofs of Claim have been rejected in whole or in part, setting forth the reasons therefor, and shall indicate in such notice that the Claimant whose claim is rejected finally has a right of review by the Court provided the Claimant complies with the requirements set forth herein and the Hearing Order.

e. Any Claimant whose claim has been finally rejected in whole or in part, and who desires to contest such final rejection must, within twenty (20) days after the date of mailing of the notice of final rejection of the Proof of Claim, serve upon Plaintiffs' Lead Counsel a notice and statement of reasons indicating the Claimant's grounds for contesting the final rejection along with any supporting documentation. Any such notice and statement shall be deemed served when actually received by Plaintiffs' Lead Counsel. Plaintiffs' Lead Counsel shall thereafter present any such notice along with a response, if desired, for review and final decision by the Court. Defendants shall not have standing to assert any position with respect to the acceptance or rejection of submitted Proofs of Claims or with respect to any controversy arising therefrom.

2. Each Claimant shall be deemed to have submitted to the jurisdiction of the Court with respect to the Claimant's claim, and the Claimant will be subject to discovery under the Federal Rules of Civil Procedure, limited to the Claimant's status as a Class Member, the amount and circumstances of the Claimant's claim, and the contents of the Proof of Claim as submitted.

3. All proceedings with respect to the Settlement described by this Stipulation and the determination of all controversies relating thereto, including disputed questions of law and fact with respect to the validity of claims, shall be subject to the continuing jurisdiction of the Court.

4. The Settlement Administrator, acting on behalf of the Class, and subject to the supervision, direction and approval

of Plaintiffs' Lead Counsel and the Court, shall review the Proofs of Claim, administer and calculate the claims submitted by Class Members and shall oversee distribution of that portion of the Settlement Funds that is finally awarded by the Court to Authorized Claimants.

5. It is agreed that the proceedings relating to, and the allowances or disallowances of, any Proof of Claim are not part of this Stipulation, and any order or proceeding relating thereto shall not operate to terminate or cancel this Stipulation or to affect its finality and enforceability.

D. *Calculation and Payment of Claims*

1. On or after the Settlement Effective Date, National Union shall transfer the remaining Settlement Funds to the Settlement Administrator as provided in paragraph B.2 above. The Settlement Administrator shall then apply the Settlement Funds as follows:

a. Subject to the approval and further order(s) of the Court, to pay Plaintiffs' Lead Counsel, on behalf of all plaintiffs' counsel, their Attorneys' Fees and Expenses from the Settlement Funds if and to the extent allowed by the Court. The fees and expenses awarded shall be delivered to Plaintiffs' Lead Counsel within three (3) business days after the funds are transferred to the Settlement Administrator. In the event that the order awarding Attorneys' Fees and Expenses is reversed or modified on appeal, and in the event that the Attorneys' Fees and Expenses awarded have been delivered to any extent, then Plaintiffs' Lead Counsel shall promptly refund any amounts received under such order (plus interest earned thereon, if any) consistent with the reversal or modification. It is agreed that the proceedings for, and the allowance or disallowance by the Court of, any applications by any of the counsel to the plaintiffs for Attorneys' Fees and Expenses are not part of this Stipulation, and any order or proceeding relating thereto shall not operate to

terminate or cancel this Stipulation or to affect its finality and enforceability;

b. To pay to Plaintiffs' Lead Counsel such amounts, if any, as may be awarded as Individual Awards to Named Plaintiffs;

c. To pay all Notice and Administration Expenses, and any taxes that may become due, if any, on the Settlement Funds which remain unpaid after the exhaustion of the Notice and Administration Fund;

d. After payment of the foregoing amounts, to pay *pro rata* that portion of the Net Settlement Funds represented by a fraction (of which the individual Recognized Loss of such Authorized Claimant is the numerator, and the sum of all Recognized Losses of all Authorized Claimants is the denominator) in the manner (the amount so allocated to each Authorized Claimant constituting his or her "Payable Claim") described in the Plan of Allocation attached hereto as Exhibit F;

No order or other proceeding relating to the Plan of Allocation, including any order modifying the Plan of Allocation or establishing a different Plan of Allocation, shall operate to terminate or change this Stipulation or to affect its finality or the finality of the Court's judgment.

2. Payment in the manner set forth above shall be deemed conclusive as to the claims of all Class Members. Class Members who do not timely submit Proofs of Claims or whose Proofs of Claims are not approved shall be barred from participating in distributions from the Settlement Funds, unless the Court orders otherwise, but in all other respects shall be bound by the terms and conditions of this Stipulation, including the terms and conditions of the release contained herein and the Final Order and Judgment entered in the Litigation.

E. *Final Order and Judgment*

1. At or prior to the Settlement Hearing, the parties shall submit to the Court on consent a proposed Final Order and Judgment, substantially in the form annexed hereto as Exhibit E, providing, among other things, as follows:

a. Approving the Settlement, as provided herein, as fair, reasonable, adequate and in the best interests of the Class, and directing the parties to consummate the Settlement in accordance with all of its terms and conditions;

b. Finding that the payment by National Union of the Settlement Funds under the Policy is in good faith and that such payment should be authorized and approved by the Court, even though such payment will deplete the Policy

c. Dismissing the Litigation with prejudice and on the merits, without costs, and extinguishing all Released Claims;

d. Permanently barring and enjoining Plaintiffs and each and every member of the Class from asserting, either directly, individually or in a representative capacity, against any of the Released Parties, any Released Claim or any claim, right, demand or cause of action which could have been asserted based upon a Released Claim; and

e. Reserving jurisdiction, without affecting the finality of the judgment with respect to the foregoing matters, over all matters relating to the administration, consummation, construction and enforcement of the Settlement provided for herein.

F. *Contingencies, Effect of Disapproval or Termination of Settlement*

1. The parties agree that Defendants or National Union shall have the unilateral option to terminate this Stipulation and cancel the Settlement in the event that Class Members who experienced an aggregate market loss with respect to Southeast Securities in excess of the "Exclusion Threshold"

mutually agreed upon between Plaintiffs' Lead Counsel, Defendants' Representative Counsel and National Union, request exclusion from the Class pursuant to the provisions set forth in the Notice or Summary Notice. Within seven (7) business days following the expiration of the last date for requesting exclusion (the "Exclusion Date"), Defendants' Representative Counsel shall notify in writing, by telecopier and by overnight express mail, National Union of the names of persons, if any, who have requested such exclusion and the type and number of securities for which each is claiming exclusion, if such information has been provided. Should Defendants or National Union wish to terminate this Settlement based upon the Exclusion Threshold having been exceeded, such termination will be effective if the Defendants' Representative Counsel or National Union notifies Plaintiffs' Lead Counsel in writing, by telecopier and by overnight mail, of the exercise of such option to terminate not later than five (5) business days following National Union's receipt from Defendants' Representative Counsel of notification of the names of persons who have requested exclusion from the Class and other information required in this paragraph F.1., and not less than five (5) business days prior to the Settlement Hearing.

2. This Settlement and the consideration therefor are offered and given in return for and are expressly contingent upon the releases described herein and upon the Defendants and their insurance carriers receiving a full and final dismissal, with prejudice, approved by the Court, and not subject to further appeal by any person, with respect to all Released Claims against all Released Parties.

3. In the event that the Court, without the consent of Plaintiffs' Lead Counsel, Defendants' Representative Counsel and National Union, modifies or refuses to approve any part of this Settlement, Plaintiffs' Lead counsel, Defendants' Representative Counsel or National Union may terminate this Stipulation and the Settlement by giving all other parties writ-

ten notice, by telecopier and by overnight express mail, of the termination no later than ten (10) days following the date of the order disapproving or modifying this Settlement or Stipulation. For purposes of this provision and the next succeeding paragraph, the fact that Attorneys' Fees and Expenses or Individual Awards to Named Plaintiffs awarded by the Court for payment from Settlement Funds are in an amount different from that sought, or that such awards are denied in total, shall not be deemed a refusal to approve or a modification of the Settlement.

4. In the event the Court approves the Stipulation and Settlement and an appeal is taken from the Court's action, Defendants, National Union or Plaintiffs shall have the right to terminate the Stipulation and the Settlement if, on appeal, the Stipulation or Settlement is disapproved or modified by the Court of Appeals or any other court.

5. If this Stipulation or the Settlement is terminated for any reason whatsoever, then, in that event, within ten (10) business days following the Termination Date, Plaintiffs' Lead Counsel shall cause to be returned to National Union any amounts National Union previously paid into the Notice and Administration Fund, together with all interest accrued thereon, less any payments made to date and/or accrued for the incurred costs of Notice and Administration Expenses, which amounts shall be deducted from the amount to be returned.

6. If the Settlement is terminated for any reason whatsoever, this Stipulation shall be null and void, shall have no further force and effect whatsoever, and shall not be admissible or otherwise used in any manner in the Litigation or in any other proceeding for any purpose and the Class Members and Defendants shall be relegated to their respective rights as if no settlement had been agreed to.

G. *Fee Application*

1. All plaintiffs' counsel, by and through Plaintiffs' Lead Counsel, will apply to the court for awards of Attorneys' Fees and Expenses from the Settlement Funds for services rendered in connection with the Litigation and the Settlement thereof. Any payment of Attorneys' Fees and Expenses shall be paid to Plaintiffs' Lead Counsel on behalf of all plaintiffs' counsel upon Court approval from the Settlement Funds after the Settlement Effective Date. Except to the extent that the Court orders Attorneys' Fees and Expenses to be paid from the Settlement Funds, in no event shall any of the Defendants or National Union have any responsibility or liability for any fees, costs or expenses, including attorneys' or experts' fees or costs, related to the Litigation. Defendants and National Union shall make no submission nor take any position with respect to the application of Plaintiffs' Lead Counsel, unless such fee application exceeds 25% of the Settlement Funds, in which event Defendants or National Union may, at their discretion, make a submission to the Court registering their position with regard to the fee application. Notwithstanding any provision contained herein, the costs of Notice and Administration Expenses, as approved by the Court, may be paid from the Settlement Funds in accordance with the provisions hereof.

H. *Stipulation Is Not An Admission*

1. This Stipulation and each of its provisions and any prior drafts thereof and the Settlement provided for herein, whether or not consummated or later terminated, and any statements, negotiations, proceedings, or agreements relating to the Stipulation, or any matter arising in connection with such statements, negotiations, proceedings, or agreements are not and shall not in any event be:

a. construed as or deemed to be evidence or a presumption of, or a concession or admission by, any of Defendants or the

Released Parties of the truth of any fact, including (*i*) any fact alleged or the validity of any claim which has been asserted or could have been asserted in the Litigation, (*ii*) of the deficiency of any defense that has or could have been asserted in the Litigation, or (*iii*) of any liability, fault, wrongdoing or otherwise of Defendants or Released Parties; or

b. admissible as evidence or offered or received as evidence or as a presumption, concession, or an admission of any actual or potential fault, misrepresentation or omission in any statement or written document, report or financial statement heretofore issued, filed, approved or made by any of Defendants or Released Parties; or

c. admissible as evidence or offered or received as evidence or as a presumption, concession, or an admission of any actual or potential liability, fault or wrongdoing or in any way referred to for any other reason against any of Defendants or Released Parties in the Litigation or in any other civil, criminal or administrative action or proceeding other than such proceedings as may be necessary to consummate or enforce this Stipulation or the Settlement; or

d. construed by anyone for any purpose whatsoever as a presumption, concession or an admission of any liability, fault, wrongdoing or otherwise on the part of any of the Defendants or Released Parties; or

e. construed as a concession or an admission that Plaintiffs and the Class Members or any of them have in fact suffered any damage; or

f. construed as an admission or concession that any combination of the Class Members constitute or could constitute a class for purposes of Federal Rule of Civil Procedure 23; or

g. construed as an admission or concession by anyone that the consideration to be given hereunder represents the amount which could be recovered after trial.

I. *Releases*

1. Upon final approval by the Court of the Settlement described in this Stipulation, and subject to the contingencies set forth above, Plaintiffs, all Class Members, and their respective heirs, executors, administrators, partners, directors, officers, employees, representatives, agents, successors and assigns of each of them, shall conclusively be deemed to have remised, released and discharged, absolutely and forever, each and all of the Released Parties of and from any and all Released Claims, including any and all manner of claims, actions, causes of action in law or equity, suits, obligations, debts, demands, agreements, promises, liabilities, controversies, costs, expenses, and attorneys' fees whatsoever, known or unknown, whether based on any federal law, state law, or common law right of action or otherwise, which the Plaintiffs, the Class or the Class Members, or any of them, ever had, now have or could have, or shall or may hereafter have (either individually or as a Class Member) by reasons of, based upon, in connection with, arising out of, or which are in any way related to the Released Claims.

J. *Miscellaneous Provisions*

1. All parties to this stipulation and all of their attorneys agree to cooperate fully with one another in seeking Court approval of the Stipulation and to use their best efforts to effect consummation of this Stipulation and the Settlement provided for herein. Defendants will take no position with respect to the Plan of Allocation, or the reimbursement of any costs.

2. Plaintiffs' Lead Counsel shall be permitted to conduct additional discovery into loan loss reserve committee meeting minutes, monthly and quarterly reports to management and the board of directors regarding classified assets, and internal auditors' reports regarding classified assets and loan loss reserves. Plaintiffs and Defendants agree that no addi-

tional discovery shall be taken unless this Settlement is terminated.

3. Without further order of the Court, the parties may agree to reasonable extensions of time to carry out any of the provisions of this Stipulation and any actions pertaining to the Notice, the Summary Notice and the administration of Proofs of Claim.

4. The Stipulation shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and assigns and any corporation, partnership or other entity into or with which any party hereto may merge, consolidate, or reorganize.

5. All of the exhibits to this Stipulation are an integral part of this Stipulation and are incorporated into the agreement of the parties to this Stipulation as though fully set forth herein.

6. This Stipulation, as well as any of its exhibits, may be executed in one or more original or telecopied counterparts, all of which such counterparts together shall be one instrument, and all of which shall be considered duplicate originals.

7. The Class Representatives, Plaintiffs' Lead Counsel, other plaintiffs' counsel and any experts, consultants or other persons engaged by them to assist in the prosecution of the Litigation, represent and agree that they shall abide by, and continue to abide by, any agreements or orders concerning the confidentiality of discovery and other materials produced by the Defendants or otherwise, and further represent and agree that all agreements made during the course of the Litigation relating to the confidentiality of information shall survive the consummation of this Settlement and the entry of the Final Order and Judgment thereon.

8. National Union agrees to submit to the jurisdiction of the Court for the limited purpose of enforcement of the terms of this Settlement. Any notice sent to National Union pursuant to this Stipulation shall be sent to:

National Union Fire Insurance
Company of Pittsburgh, PA
c/o D'Amato & Lynch
Attn: Harry J. Arnold, Jr., Esquire
70 Pine Street
New York, New York 10270
(212) 425-2070 (fax)

9. The foregoing, including all of the exhibits appended hereto, constitutes the entire agreement of the parties with respect to the subject matter hereof, and may not be modified or amended except in a writing signed by all parties hereto.

10. The waiver by one party of any breach of this Stipulation by any other party shall not be deemed a waiver of any other prior or subsequent breach of this Stipulation, any such waiver to be enforceable only if in a writing delivered to the other parties to this Stipulation.

11. Plaintiffs' Lead Counsel on behalf of the Class has been expressly authorized by their clients and the Court to enter into this Stipulation on behalf of the Class, to bind them thereby, and to take all appropriate action required or permitted to be taken by the Class pursuant to this Stipulation to effectuate its terms, and also is expressly authorized to enter into any modification or amendments to this Stipulation on behalf of the Class. Any notice or funds sent to Plaintiffs' Lead Counsel pursuant to this Stipulation shall be sent to:

Michael J. Pucillo, Esquire
Chimicles, Burt, Jacobsen & McNew
Esperanté, Suite 960
222 Lakeview Avenue
West Palm Beach, Florida 33401
(407) 835-0322 (fax)

12. Defendants' Counsel, on behalf of the Defendants, have been expressly authorized by the Defendants to enter into this Stipulation on their behalf, to bind them thereby, and

to take all appropriate action required or permitted to be taken by Defendants pursuant to this Stipulation to effectuate its terms. Any notice sent to Defendants' Representative Counsel pursuant to this Stipulation shall be sent to:

Lewis F. Murphy, P.A.
Steel Hector & Davis
4000 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2398
(305) 358-1418 (fax)

and

Robert T. Wright, Jr., Esquire
Mershon, Sawyer, Johnston,
Dunwody & Cole
Suite 4500, First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2387
(305) 376-8654 (fax)

except that Requests for Exclusion shall be mailed only to Lewis F. Murphy, P.A.

13. This Stipulation and the Exhibits hereto shall be governed and interpreted in accordance with the substantive laws of the State of Florida, without regard to any choice of law rules or provisions.

IN WITNESS WHEREOF, the Stipulation has been executed by the undersigned counsel of record as of the date set forth below.

DATED: August 19, 1993.

CHIMICLES, BURT, JACOBSEN
& MCNEW

By: MICHAEL J. PUCILLO
MICHAEL J. PUCILLO
Fla. Bar No.: 261033
WENDY H. ZOBERMAN
Fla. Bar No.: 434670
Esperanté, Suite 960
222 Lakeview Avenue
West Palm Beach, FL 33401
(407) 835-9400

STULL, STULL & BRODY

By: _____
JULES BRODY
MARK LEVINE
6 East 45th Street
New York, NY 10017
(212) 687-7230

LAW OFFICES OF JOSEPH H. WEISS

By: _____
JOSEPH H. WEISS
319 Fifth Avenue
New York, NY 10016
(212) 532-4171

Plaintiffs' Lead Counsel

IN WITNESS WHEREOF, the Stipulation has been executed by the undersigned counsel of record as of the date set forth below.

DATED: August 19, 1993.

CHIMICLES, BURT, JACOBSEN
& MCNEW

By: _____
MICHAEL J. PUCILLO
Fla. Bar No.: 261033
WENDY H. ZOBERMAN
Fla. Bar No.: 434670
Esperante, Suite 960
222 Lakeview Avenue
West Palm Beach, FL 33401
(407) 835-9400

STULL, STULL & BRODY

By: MARK LEVINE
JULES BRODY
MARK LEVINE
6 East 45th Street
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(212) 687-7230

LAW OFFICES OF JOSEPH H. WEISS

By: JOSEPH H. WEISS/MEL
JOSEPH H. WEISS
319 Fifth Avenue
New York, NY 10016
(212) 532-4171

Plaintiffs' Lead Counsel

STEEL HECTOR & DAVIS

By: LEWIS F. MURPHY
LEWIS F. MURPHY, P.A.
200 S. Biscayne Blvd.
Miami, FL 33131-2398
(305) 577-7000

Attorneys for Defendants John D. Porta, Charles J. Zwick, Paul Hill, Kristen M. Hudak, Samuel A. Milne and Douglas E. Ebert

and

MERSHON, SAWYER, JOHNSTON, DUNWODY & COLE

By: ROBERT T. WRIGHT, JR.
ROBERT T. WRIGHT, JR.,
Suite 4500, First Union Financial Center
200 S. Biscayne Boulevard
Miami, FL 33131-2387
(305) 358-5100

Attorneys for Defendant Florence Schust Bassett, as Personal Representative of the Estate of Harry Hood Bassett

A.I. MANAGEMENT AND PROFESSIONAL LIABILITY CLAIM ADJUSTERS, on behalf of NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA

By: _____

STEEL HECTOR & DAVIS

By: LEWIS F. MURPHY
LEWIS F. MURPHY, P.A.
200 S. Biscayne Blvd.
Miami, FL 33131-2398
(305) 577-7000

Attorneys for Defendants John D. Porta, Charles J. Zwick, Paul Hill, Kristen M. Hudak, Samuel A. Milne and Douglas E. Ebert

and

MERSHON, SAWYER, JOHNSTON, DUNWODY & COLE

By: ROBERT T. WRIGHT, JR.
ROBERT T. WRIGHT, JR.,
Suite 4500, First Union Financial Center
200 S. Biscayne Boulevard
Miami, FL 33131-2387
(305) 358-5100

Attorneys for Defendant Florence Schust Bassett, as Personal Representative of the Estate of Harry Hood Bassett

A.I. MANAGEMENT AND PROFESSIONAL LIABILITY CLAIM ADJUSTERS, on behalf of NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA

By: WILLIAM JACOBI
William Jacobi
Assistant Vice President

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MASTER FILE
Filed August 27, 1993
CIVIL ACTION NO. 90-0760-CIV-MOORE

IN RE: SOUTHEAST BANKING CORP.
SECURITIES LITIGATION

THIS DOCUMENT RELATES TO ALL ACTIONS

ORDER WITH RESPECT TO NOTICE, SETTLEMENT HEARING AND ADMINISTRATION

Upon review and consideration of the Stipulation of Settlement dated August 19, 1993, and the exhibits annexed thereto (the "Stipulation"), executed on behalf of Harvey Wiener, William J. Hall, The Maynard Slessinger Trust, Paula P. Folkman, Gasper Sclafani, Myers L. Girsh and DCA Grantor Trust ("Plaintiffs"), and Defendants John D. Porta, Charles J. Zwick, Paul Hill, Kristen M. Hudak, Samuel A. Milne, Douglas E. Ebert and Florence Schust Bassett as Personal Representative of the Estate of Harry Hood Bassett ("Defendants"), in the above-captioned litigation (the "Litigation"); and as a hearing on the proposed Settlement described in the Stipulation is necessary;

NOW, upon the application of Plaintiffs and Defendants, it is hereby ORDERED as follows:

1. The terms of the Stipulation and the Settlement provided for therein are preliminarily approved, subject to further consideration thereof at the Settlement Hearing described at paragraph 11 of this Order. For purposes of this Order, the Court adopts and incorporates the definitions set forth in the Stipulation.

2. As soon as practicable after the entry of this Order, but no later than ten (10) business days from this date, Plaintiff's Lead Counsel shall, as a Notice and Administration Expense as defined in the Stipulation, cause Southeast Banking Corp.'s former transfer agent or such other entity presently maintaining such records to provide a list of all readily identifiable members of the Class as they may appear on the records of such transfer agent or other entity (the "List") (on computer disks or other computer readable form, if available) to Plaintiffs' Lead Counsel (or his designee). Following receipt of the List, Plaintiffs' Lead Counsel (or his designee) shall provide notice of this Settlement and of the Settlement Hearing to all Class Members, as follows:

(a) to all potential Class Members who can be identified from the List, by mailing a copy of the Notice of Class Action, Proposed Settlement, Settlement Hearing, and Right to Appear ("the Notice"), substantially in the form attached to the Stipulation as Exhibit B, and the Proof of Claim and Release ("Proof of Claim"), substantially in the form attached to the Stipulation as Exhibit C; and

(b) by causing to be published, approximately one week following the initial mailing of the Notice, a Summary Notice, substantially in the form annexed to the Stipulation as Exhibit D, once each in the national edition of *The Wall Street Journal*, and in the business section of the *Miami Herald*.

3. As set forth in the Notice, all Nominees who held Southeast Securities of record for Class Members and who have not previously supplied the Settlement Administrator with the names and addresses of such Class Members are directed, as agents of such Class Members, either (*a*) to supply the Settlement Administrator with a list of the names and addresses of such beneficial holders, or (*b*) to forward copies of the Notice and Proof of Claim to the beneficial owners of such securities and to submit a sworn statement to Plaintiffs' Lead Counsel at a Post Office Box address to be designated by the Settlement Administrator as provided below, that they have done so, which statement shall contain a list of the names and addresses of such beneficial holders. Upon full compliance with this Order, such Nominees may seek reimbursement of their reasonable and actual out-of-pocket expenses in complying with this Order by submitting to the Settlement Administrator, made under penalty of perjury in affidavit or declaration form, a statement itemizing all such expenses and stating, in substance, that the foregoing expenses would not have been incurred but for compliance with this Order, except that no reimbursement will be made for service charges, handling fees, excess postage or similar charges. Additional copies of the Notice and Proof of Claim for transmittal to beneficial owners shall be made available by Plaintiffs' Lead Counsel upon written request to the Settlement Administrator at a Post Office Box address as designated therein.

4. The reasonable and verifiable costs and expenses of obtaining a list of all readily identifiable members of the Class, identifying and notifying Class Members, printing, preparing and mailing the Notice, reviewing and processing Proofs of Claim, including complying with the instructions addressed to the Nominees, assisting the making of claims, soliciting the revocation of requests for exclusion, and publishing the Summary Notice, along with the reasonable costs and expenses of administering the settlement and the Settlement Funds, shall be paid from the Notice and Administration Fund and, if necessary, from Settlement Funds pursuant to the

terms of the Stipulation. Under no circumstances shall the Defendants, their counsel, or their insurers be required to give or fund, other than by payment of Settlement Funds into the Notice and Administration Fund, as provided in paragraph B.3 of the Stipulation, any notice to Class members.

5. At least 5 days prior to the hearing described in paragraph 11, Plaintiffs' Lead Counsel, the Claims Administrator, or one of their designees shall serve and file a sworn statement evidencing compliance with the provisions of paragraph 2 of this Order concerning the mailing of the Notice and the Proofs of Claim, and concerning the publication of the Summary Notice.

6. Notice in compliance with the provisions set forth in paragraph 2 and paragraph 3 above is hereby found to be the best notice practicable under the circumstances, and constitutes due and sufficient notice of this Order to all persons affected by and/or entitled to participate in the Settlement, in full compliance with the notice requirements of Rule 23 of the Federal Rules of Civil Procedure.

7. Any Class Member desiring exclusion from the Class shall mail a request for exclusion ("Request for Exclusion") to Lewis F. Murphy, P.A., 4000 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2398, postmarked not later than 30 days before the hearing described in paragraph 11. Such request shall set forth: (*i*) the name, address and telephone number of the Class Member; (*ii*) the number of securities by type, with the dates and prices of trades of such Southeast Securities beneficially owned during the Class Period; and (*iii*) the name and address of the person in whose name the securities were registered. Failure to provide the necessary information shall invalidate any Request for Exclusion unless the information is subsequently provided in writing to Defendants' Representative Counsel no later than the last day by which Requests for Exclusion must be postmarked. Requests for Exclusion shall be deemed to have been made in each and every capacity in which the per-

son requesting the exclusion is acting with respect to such Class Member. Any Class Member who does not properly and timely request exclusion shall be included in the Class and shall be bound by any Final Judgment entered in this Litigation even if such Class Member does not submit a timely Proof of Claim.

8. To effectuate the Settlement and the notice provided for in paragraph 3 hereof, Plaintiffs' Lead Counsel has appointed a Settlement Administrator, the firm of Rudolph, Palitz, Certified Public Accountants, 620 West Germantown Pike, Suite 400, Plymouth Meeting, Pennsylvania 19462, which firm shall lease and maintain a post office box of adequate size for the return of Proofs of Claim. All Notices to the Class shall designate said post office box as the return address for Proofs of Claim. The Settlement Administrator shall be responsible for the receipt of all responses from Class Members (except Requests for Exclusion) and Nominees, and shall preserve all entries of appearance, Proofs of Claim, and any and all other written communications from Class Members, the Nominees, or any other person in response to said notice until one year following the Date of Distribution as defined in the Stipulation or pursuant to Order of the Court. All written communications received from Class Members or Nominees (including submitted Proofs of Claim) and all written responses to inquiries by Class Members or Nominees relating to this Stipulation and Settlement shall be available at all reasonable times for inspection and copying by Defendants' Representative Counsel and Plaintiffs' Lead Counsel, subject to further order of the Court if issues of privilege or confidentiality arise. All mailed notices to the Class shall designate Defendants' Representative Counsel Lewis F. Murphy, P.A., Steel Hector & Davis, 4000 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2398 as the person to whom Requests for Exclusion shall be sent. Defendants' Representative Counsel shall file with the Court a list of all those who have submitted Requests for Exclusion no

later than seven (7) business days following the last business day on which Requests for Exclusion must be postmarked.

9. In order to be deemed an Authorized Claimant entitled to participate in the Net Settlement Funds, as defined in the Stipulation, in the event the Settlement is effected in accordance with all of the terms and conditions thereof, Class Members must take the following actions and shall be subject to the following conditions:

(a) A properly executed and verified Proof of Claim must be submitted to the Settlement Administrator, at the Post Office Box indicated in the Notice, on or before 40 days after the hearing described in paragraph 11. Each Proof of Claim shall be deemed to have been submitted timely if received or postmarked on or before 40 days after the hearing described in paragraph 11.

(b) As part of the Claimant's Proof of Claim, each Class Member shall (subject to effectuation of the Settlement) release all claims as provided in the Stipulation. However, failure to file this Release shall not affect the validity of the Release set forth in the Stipulation, or which may be incorporated into this Court's final judgment, which shall bind all Class Members except those who have been excluded pursuant to a timely Request for Exclusion and order of the Court.

(c) Any Class Member who does not timely file a Proof of Claim shall not be entitled to any share in the Class Settlement Funds, but shall nonetheless be bound by the Court's judgment in this matter and shall be forever barred and enjoined from asserting any of the Released Claims against any Released Party.

10. Memoranda in support of the Settlement, petitions for attorneys' fees and reimbursement of expenses by Plaintiffs' Counsel and individual awards to named plaintiffs shall be

filed with the Clerk of the Court on or before 35 days before the hearing described in paragraph 11.

11. A hearing (the "Settlement Hearing") shall be held before the undersigned at 8:30 a.m. on November 15th, 1993 in the South Courtroom of the Old Federal Courthouse Building at 300 Northeast First Avenue, Miami, Florida 33128, to consider the fairness, reasonableness and adequacy of the proposed Settlement, the dismissal of the Litigation on the merits and with prejudice in accordance with the terms of the Stipulation, petitions for attorneys' fees and reimbursement of expenses by plaintiffs' counsel and to hear and determine such matters as the Court may deem appropriate. This hearing may be postponed, adjourned or continued by Order of the Court without further notice to the Class. Any such postponement, adjournment or continuance may be announced at the Settlement Hearing and there will be no other or further notice required with respect thereto.

12. Any Class Member who does not elect to be excluded may appear at the Settlement Hearing in person or by counsel, if an appearance is filed and served as hereinafter provided, and may be heard to the extent allowed by the Court in support of, or in opposition to, the fairness, reasonableness and adequacy of the proposed Settlement, the requested awards of attorneys' fees and reimbursement of expenses and/or the individual awards to the named Plaintiffs; provided, however, that no person shall be heard in opposition to the proposed Settlement and the judgment to be entered thereon, or to the requested awards of attorneys' fees and reimbursement of expenses, unless, on or before 15 days before the hearing described in paragraph 11 such person: (*a*) has filed with the Clerk of the Court a notice of such person's intention to appear together with a statement that indicates the basis for such opposition along with any supporting documentation and which includes the information identified in clauses (i), (ii) and (iii) of paragraph 7 herein, and (*b*) has served copies of such notice, statement, and documentation together with

copies of any other papers or briefs that such person files with the Court, either in person or by mail, upon Plaintiffs' Lead Counsel, Michael J. Pucillo, Esquire, Chimicles, Burt, Jacobsen & McNew, 222 Lakeview Avenue, Suite 960, West Palm Beach, Florida 33401; and upon Defendants' Representative Counsel, Lewis F. Murphy, P.A., Steel Hector & Davis, 4000 First Union Financial Center, 200 South Biscayne Boulevard, Miami, FL 33131-2398.

13. For settlement purposes only, the allegations in Plaintiffs' Fourth Consolidated Amended and Supplemental Complaint relating to the Class and Class Period are hereby amended by interlineation to be consistent with the definitions in the Stipulation.

14. The Court hereby grants, for settlement purposes only, Plaintiffs' motion to substitute the Estate of Harry Hood Bassett as a party defendant for Harry Hood Bassett.

15. All proceedings in the Litigation other than such as may be necessary to carry out the terms and conditions of the Stipulation or the responsibilities related or incidental thereto are stayed and suspended until further order of this Court.

16. Upon consummation and approval of the Settlement provided for in the Stipulation, the Stipulation, and each and every term and provision thereof, shall be deemed incorporated herein as if explicitly set forth and shall have the full force and effect of an order of this Court.

17. If the Settlement is terminated for any reason whatsoever, the Settlement and all proceedings had in connection therewith shall be without prejudice to the *status quo ante* rights of the parties to the action, and all Orders issued pursuant to the Settlement shall be vacated. In such an event, the Settlement and all negotiations concerning it, shall not be used or referred to in any manner for any purpose whatsoever in this or any other litigation.

DONE AND ORDERED at Miami, Florida, this 27th day of August, 1993.

/s/ KEVIN MICHAEL MOORE
Honorable Kevin Michael Moore
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MASTER FILE
Filed November 1, 1993
CIVIL ACTION NO. 90-0760-CIV-MOORE

IN RE: SOUTHEAST BANKING CORP.
SECURITIES LITIGATION

THIS DOCUMENT RELATES TO ALL ACTIONS

NOTICE OF INTENTION OF WILLIAM A. BRANDT, JR., AS ADMINISTRATOR OF THE INVESTMENT PLUS PLAN OF SOUTHEAST BANKING CORPORATION, TO APPEAR AT THE SETTLEMENT HEARING TO OPPOSE THE PLAINTIFFS' COUNSELS' JOINT PETITION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

PLEASE TAKE NOTICE, that William A. Brandt, Jr., as administrator of the Investment Plus Plan of Southeast Banking Corporation (the "Administrator"), by and through his undersigned counsel, hereby intends to appear at the Settlement Hearing in this action and oppose the Plaintiffs' Counsels' Joint Petition For An Award Of Attorneys' Fees And Reimbursement Of Expenses.

PLEASE TAKE FURTHER NOTICE, that the Administrator has filed with this Court The Memorandum Of Law Of

William A. Brandt, Jr., As Administrator Of The Investment Plus Plan Of Southeast Banking Corporation, In Opposition To Plaintiffs' Counsels' Joint Petition For An Award Of Attorneys' Fees And Reimbursement Of Expenses.

PLEASE TAKE FURTHER NOTICE, that the Administrator does not have the information described in the second paragraph under the heading REQUEST FOR EXCLUSION in the Notice Of Pendency Of Class Action, Proposed Settlement, Settlement Hearing, And Right To Appear And Notice To Nominees, nor any of the supporting documentation. The Administrator, however, is currently compiling this information and documentation, and will provide it to the necessary parties when it is available.

Respectfully submitted,

ROSS & HARDIES
Attorneys for William A. Brandt, Jr., as Administrator of the Investment Plus Plan of Southeast Banking Corporation

By: J. JOSEPH BAINTON
J. Joseph Bainton
65 East 55th Street
New York, New York 10022-3219
(212) 421-5555

Of Counsel:

Sean M. Sullivan
Andrew H. Beatty

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the NOTICE OF INTENTION OF WILLIAM A. BRANDT, JR., AS ADMINISTRATOR OF THE INVESTMENT PLUS PLAN OF SOUTHEAST BANKING CORPORATION, TO APPEAR AT THE SETTLEMENT HEARING TO OPPOSE THE PLAINTIFFS' COUNSELS' JOINT PETITION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES were served by regular mail, postage prepaid, on

Michael J. Pucillo, Esq.
Chimicles, Burt, Jacobsen & McNew
222 Lakeview Avenue
West Palm Beach, FL 33401

and

Lewis F. Murphy, P.A.
Steel Hector & Davis
4000 First Union Financial Center
200 South Biscayne Boulevard
Miami, FL 33131-2398

this 31st day of October, 1993.

/s/ ANDREW H. BEATTY
Andrew H. Beatty

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MASTER FILE
Filed November 1, 1993
CIVIL ACTION NO. 90-0760-CIV-MOORE

IN RE: SOUTHEAST BANKING CORP.
SECURITIES LITIGATION

THIS DOCUMENT RELATES TO ALL ACTIONS

MEMORANDUM OF LAW OF WILLIAM A. BRANDT, JR., AS ADMINISTRATOR OF THE INVESTMENT PLUS PLAN OF SOUTHEAST BANKING CORPORATION, IN OPPOSITION TO PLAINTIFFS' COUNSELS' JOINT PETITION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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Preliminary Statement

William A. Brandt, Jr., as administrator of the Investment Plus Plan (the "Plan") of Southeast Banking Corp. ("Southeast") (the "Administrator"), by his attorneys, Ross & Hardies, submits this Memorandum of Law in Opposition to the Plaintiffs' Counsels' Joint Petition for an Award of Attorneys' Fees and Reimbursement of Expenses.

The Administrator of the Plan, of which approximately 5,000 former employees of Southeast or it affiliates are beneficiaries, has reviewed the Plaintiffs' Counsels' Joint Petition For An Award of Attorneys' Fees and Reimbursement of Expenses (the "Fee Petition") and concluded that, based on the Fee Petition, an award of a $1,250,000 to plaintiffs' counsels—an amount totalling over 33.3% of the amount to be received by all of the plaintiffs—is unreasonable. Accordingly, the Administrator submits this Memorandum of Law, and respectfully requests that this Court deny the Fee Petition.

Statement Of Facts

Although not one of the complaints brought on behalf of their clients survived the test of a motion to dismiss, plaintiffs' counsels believe they are entitled to a $1.25 million fee. In support of their request for this enormous fee, plaintiffs' counsels have filed a Fee Petition, which purports to explain and support their request. A review of the Fee Petition, however, fails to provide any evidence of how the fee amount of $1,250,000 was determined. Moreover, the Fee Petition offers no explanation of why it is reasonable to pay $1,250,000 to attorneys in a case in which no discovery took place and resulted in a *de minimis* recovery for their clients.

Argument

I. PLAINTIFFS' COUNSELS MUST PROVE THAT THE AMOUNT OF THE FEE REQUESTED IS REASONABLE

Plaintiffs' counsels' Fee Petition fails to set forth any basis to support the reasonableness of the amount sought. Plaintiffs' counsels attempt to excuse their failure to submit any evidence supporting the reasonableness of their Fee Petition by arguing that the Eleventh Circuit has adopted the "reasonable percentage" theory of determining an appropriate attorneys' fee in "common fund" cases, and that such support is not required under the reasonable percentage theory. In essence, plaintiffs' counsels argue that they should be given the $1,250,000 because a fee of 25% of the settlement amount is *prima facie* reasonable. This is a gross misstatement of the law.

Typically, attorneys' fees, where recoverable, have been awarded either based on a reasonable percentage of the amount recovered or by reference to a so-called "lodestar" analysis. Under the lodestar approach the court determines the number of hours reasonably spent by the plaintiff's attorney on the case and a reasonable hourly rate, and multiplies the resulting amount by a figure chosen to reflect the circumstances of the particular case. *See Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973); *Johnson v. Georgia Highway Express Inc.*, 488 F.2d 714 (5th Cir. 1974).[1]

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[1] The factors set out in *Johnson* are: (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) any prearranged fee; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

In *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991), the Eleventh Circuit held that "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." 946 F.2d at 774. The court did not, as plaintiffs' counsels suggest, "reject" the lodestar factors set forth in *Lindy Bros.* and *Johnson* as elements to be considered in determining a *reasonable* percentage of the fund to be awarded as attorneys' fees, nor did the court establish any specific percentage which would be reasonable in all cases. In fact, the court specifically found that "[t]here is no hard and fast rule mandating a certain percentage of a common fund which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case." *Id.* The court noted the importance of avoiding the problems and criticisms of a common fund fee award being summarily granted as a percentage of the fund recovered without any findings supporting its reasonableness, and wrote:

> The factors which will impact upon the appropriate percentage to be awarded as a fee in any particular case will undoubtedly vary. We agree with the Tenth Circuit that the *Johnson* factors continue to be appropriately used in *evaluating, setting and reviewing percentage fee awards in common fund cases*.

946 F.2d at 775 (Emphasis added).

The Eleventh Circuit relied, in part, upon *Brown v. Philips Petroleum Company*, 838 F.2d 451 (10th Cir.), *cert. denied*, 488 U.S. 822, 109 S.Ct. 66 (1988), where the Tenth Circuit observed that the percentage reflected in a common fund award must be reasonable, and wrote:

> To determine reasonableness, federal courts have relied heavily on the factors articulated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), in calculating and reviewing attorneys' fees awards, . . . Because these factors measure the

> attorneys' contributions, they are also appropriate in setting and reviewing percentage fee awards in common fund cases.

838 F.2d at 454.

Moreover, the fee applicant bears the burden of establishing the reasonableness of the requested fees. *Cf. Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1988) ("fee applicant bears the burden of establishing entitlement and documenting the appropriate hours and hourly rates . . . [and] bears the burden in the first instance of supplying the court with specific and detailed evidence from which the court can determine the reasonable hourly rate"). *See, also, Miller v. Mackey International, Inc.*, 70 F.R.D. 533, 537 (S.D. Fla. 1976) ("[I]n cases where the right to attorney's fees arises under the equitable fund doctrine, . . . the court must necessarily be presented with the information necessary to justify an award and to determine the fee.").

II. PLAINTIFFS' COUNSELS HAVE FAILED TO ESTABLISH THAT THE AMOUNT OF THE FEE REQUESTED IS REASONABLE

Plaintiffs' counsels argue that the requested fee of $1,250,000 is reasonable in view of the "recovery obtained, the degree of risk involved, the complexity of this action, the number of hours invested, the vigorous contesting of law and fact between counsel for the settling parties through the course of this litigation, and the skill required to produce the result obtained in the proposed settlement." Plaintiffs' Counsels' Memorandum, at 29. Yet, plaintiffs' counsels have provided *no* support for these conclusory statements, or for the argument that a $1,250,000 fee is reasonable and fair given the services performed and the result obtained.

A. Plaintiffs' Counsels Have Presented No Proof That The Benefits Of The Settlement To The Plaintiffs Is Sufficient To Warrant A $1,250,000 Fee

Plaintiffs' counsels assert that the requested fee is justified because of the "skill required to produce the result obtained in the proposed settlement," but other than general conclusory statements about intense negotiations, they present no facts concerning the way in which the proposed settlement was reached. Without such information, the Court cannot evaluate what weight, if any, to give to the terms of the settlement in determining a reasonable fee. As the court explained in *City of Detroit v. Grinnell Corporation*, 560 F.2d 1093, 1099 (2d Cir. 1977):

> Especially in class actions, judges determining fee awards should not be unduly influenced by the monetary size of the class settlement or judgment; a large settlement can as much reflect the number of potential class members or the scope of a defendant's past acts as it can indicate the prestige, skill, and vigor of the class's counsel.

Such a cautious approach is particularly appropriate in this case. Pursuant to the proposed settlement, the $5 million settlement fund is to be paid from proceeds of insurance policies totalling $45 million. Plaintiffs' counsels have presented no facts establishing that a settlement for approximately 11% of available insurance proceeds is such a good result as to justify giving 25% of the recovery to the attorneys. Moreover, plaintiffs' counsels have presented no evidence concerning the damages which plaintiffs could have recovered if successful at trial. The Court cannot evaluate whether the $5 million settlement, when compared to the potential damages discounted by the likelihood of prevailing, represents a settlement of such benefit to the plaintiffs as to justify a $1,250,000 fee. Likewise, plaintiffs' counsels have presented

no facts concerning the manner in which settlement negotiations proceeded or in which the $5 million settlement was reached. Clearly, if the defendants' insurer offered to settle the plaintiffs' claims for $5 million at the time the initial complaint was filed, it could hardly be said that such a settlement resulted from the skill of plaintiffs' counsels. Yet, plaintiffs' counsels have failed to provide the Court with *any* information with which to make that determination. Where, as here, plaintiffs' counsels have declined to produce the evidence necessary to evaluate the "value" of the settlement to the plaintiffs, the Court should not consider the amount of the settlement as evidence that the requested $1,250,000 fee is reasonable.

B. Plaintiffs' Counsels Have Presented No Proof That The Number Of Hours Spent On This Matter Was Reasonable Or Warrants The Requested $1,250,000 Fee

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). *See, also*, *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983) (The first step in calculating fee awards is to determine the number of hours reasonably spent by counsel for the party seeking the fees. . . . The district court must determine not just the actual hours expended by counsel, but which of those hours were reasonably expended in the litigation."); *Brown v. Philips Petroleum Company*, 838 F.2d 451, 454 (10th Cir. 1988) (attorneys' hours reasonably billed and hourly rate "measure the attorneys' contributions, [and] are . . . appropriate in setting and reviewing percentage fee awards in common fund cases").

In this case, plaintiffs' counsels assert that their $1,250,000 fee request is reasonable because of the "number of hours

invested." According to plaintiffs' counsels' affidavits, they "invested" 3183.2 hours in this case. They further assert that, at the customary hourly rates charged by the attorneys involved, those services have a market value of $975,584—an *average* of $306.48 per hour. If the hours invested are applied to a $1,250,000 fee, the hourly rate increases to $392.69. Notwithstanding the enormous average hourly rate which plaintiffs' counsels are proposing they be paid, they have submitted *no* evidence to establish that the time they devoted to this case was reasonable. Moreover, because they have not submitted contemporaneous time records, neither the plaintiffs nor the Court can determine whether the time upon which they are relying as a ground for the $1,250,000 fee was *reasonably* spent.

It is well-settled that time which is not reasonably spent for the benefit of the plaintiff may not be the basis of an award of fees. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1982) ("The district court . . . should exclude from this initial fee calculation hours that were not 'reasonably expended.' "). For example, time expended on a discreet and unsuccessful claim should be excluded when determining an appropriate award of attorneys' fees. *Id. See, also, Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988) ("[I]n determining reasonable hours the district court must deduct time spent on discrete and unsuccessful claims."). Similarly, hours spent duplicating work cannot form the basis of an award of attorneys' fees. *Norman*, 836 F.2d at 1301. As the Eleventh Circuit wrote in *Norman*:

> [A] lawyer may not be compensated for hours spent on activities for which he would not bill a client of means who was seriously intent on vindicating similar rights, recognizing that in the private sector the economically rational person engages in some cost benefit analysis. In the final analysis, exclusions for excessive or unnecessary work on given tasks must be left to the discretion of the district court. . . . Generalized statements that the

> time spent was reasonable or unreasonable of course are not particularly helpful and not entitled to much weight.

836 F.2d at 1301.

Because parties must be *specific* as to the reasonableness or unreasonableness of the time worked, it is imperative that the attorney seeking an award of fees submit evidence, preferably in the form of contemporaneous time records, which set forth in detail the tasks allegedly performed and the time devoted to those tasks. As the Supreme Court noted in *Hensley, supra*:

> [T]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant . . . should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.

461 U.S. at 437.

> Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

461 U.S. at 433. *See, also, Norman*, 836 F.2d at 1303 ("[F]ee counsel should have maintained records to show the time spent on the different claims, and the general subject matter of the time expenditures ought to be set out with sufficient particularity so that the district court can assess the time claimed for each activity."); *United Slate, Tile & Composition v. G&M Roofing*, 732 F.2d 495, 502 n.2 (6th Cir. 1984) (supporting documentation "must be of sufficient detail and probative value to enable the court to determine with a *high degree of certainty* that such hours were actually and reasonably expended"); *Brown*, 838 F.2d at 456 n.3 (availability of contemporaneous time records enhances the trial court's ability to properly evaluate the "time and labor involved" factor in a common fund case); *Cantor v. Detroit Edison Company*, 86 F.R.D. 752, 764 (E.D. Mich. 1980) (in complex fee award case "it is at least incumbent upon counsel to keep careful time records," and no allowance of fees may be made on the basis of "reconstructed" time). *Cf. Gutierrez v. City of*

Hialeah, 729 F. Supp. 1329, 1335 (S.D. Fla. 1990) (detailed accounting of the hours, costs and purposes of work expended is necessary in order to enable opposing counsel and the court to consider the reasonableness of attorneys fees and costs requested as sanction for violation of Rule 11); *Dorfman v. First Boston Corp.*, 70 F.R.D. 366, 374 (E.D. Pa. 1976) ("We think that class action counsel in seeking an award of counsel fees from the court have an affirmative obligation to themselves and to the court to present a detailed, accurate and comprehensive fee petition.").

Here, plaintiffs' counsels have failed to submit contemporaneous time records, or any other evidence to establish that the specific work on which they base their fee request was reasonable. Without such evidence the Court cannot determine whether the requested fee is reasonable, and plaintiffs' counsels' Fee Petition should therefore be denied.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' Counsels' Fee Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the MEMORANDUM OF LAW OF WILLIAM A. BRANDT, JR., AS ADMINISTRATOR OF THE INVESTMENT PLUS PLAN OF SOUTHEAST BANKING CORPORATION, IN OPPOSITION TO PLAINTIFFS' COUNSELS' JOINT PETITION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES were served by regular mail, postage prepaid, on

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this 31st day of October, 1993.

/s/ ANDREW H. BEATTY
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Supreme Court, U.S.
FILED
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No. 95-631 (2)

In The

Supreme Court of the United States

October Term, 1995

IN RE: SOUTHEAST BANKING CORP. SECURITIES LITIGATION.

WILLIAM A. BRANDT, JR., AS ADMINISTRATOR OF THE INVESTMENT PLUS PLAN OF THE SOUTHEAST BANKING CORPORATION,

Petitioner,

vs.

HARVEY WEINER, WILLIAM J. HALL, THE MAYNARD SLESSINGER TRUST, PAULA P. FOLKMAN, GASPER SCLAFANI, MYERS L. GIRSCH AND DCA GRANTOR TRUST,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether in a Rule 23(b)(3) class action, a representative of non-named class members who has failed to intervene pursuant to Rule 24 and who has failed to avail himself of collateral procedures to protect the interests of the non-named class members he represents, lacks standing to appeal the district court's order approving the settlement of the action.

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APPENDIX

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Appendix B — Notice of Pendency of Class Action, Proposed Settlement, Settlement Hearing, and Right to Appear and Notice to Nominees 27a

Respondents, Harvey Weiner, William J. Hall, The Maynard Slessinger Trust, Paula P. Folkman, Gasper Sclafani, Myers L. Girsch and DCA Grantor Trust ("Class Plaintiffs"), submit this brief in opposition to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

The Petitioner in this action seeks certiorari review of a per curiam dismissal of the Petitioner's appeal for lack of standing. Petitioner is the Administrator of the Investment Plus Plan (the "Plan"), the pension plan for former employees of Southeast Banking Corporation ("Southeast") and its affiliates.[1] Beneficiaries of the Plan, which made purchases of Southeast stock during the Class Period, are also members of the Class certified by the district court. It is undisputed that Petitioner was not a named party and, notwithstanding clear authority in the Eleventh Circuit requiring intervention under Rule 24, Fed.R.Civ.P. ("Rule 24") in order to perfect rights to appeal, Petitioner never moved to intervene as Administrator of the Plan in the district court.[2] As such, Petitioner has no standing to

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1. Petition for a Writ of Certiorari (hereinafter "Cert. Pet."), p. 3. Record references to pleadings and other court documents are indicated by "R[volume #]-[document #]-[page #]," and record references to transcripts are indicated by "R[volume #]-[page #]".

2. Petitioner attempted to intervene in the district court in his separate capacity as bankruptcy Trustee for the Chapter 7 estate of Southeast. He did so not to protect the interests of the Plan or the Class, but because he claimed the Stipulation of Settlement contained language that "might be construed by aggressive defense counsel to impair or impede the Trustee's ability to recover money damages on behalf of Southeast's bankruptcy estate." R11-225-1. Petitioner's Motion to Intervene as Bankruptcy Trustee was never granted by the district court. Even if it had been, the bankruptcy Trustee is not a member of the Class, does not represent any members of the Class and would have no standing to object to the settlement approved below.

prosecute this appeal. Petitioner now challenges the dismissal of his appeal by attacking the precedent he failed to follow.

Petitioner attempts to describe a split among the Circuits which, he asserts, is growing "both wider and more mature." Cert. Pet. p. 1. However, as discussed below, the conflict suggested by Petitioner is neither as real nor as significant as Petitioner suggests. Rather, there is a very definite trend among every Circuit which has addressed the issue directly to adopt the approach set forth by the Eleventh Circuit in *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), which held that in order to preserve the right to appeal from a class action settlement, a non-named class member must formally intervene under Rule 24. As this Court has done three times since 1990, it should deny certiorari review on this issue.

This action arose as a consolidation of several shareholder class actions, the first of which was filed in March of 1990. The action concerned and preceded the collapse of Southeast Bank, a major economic institution in South Florida. The Class Plaintiffs' claims were brought pursuant to Section 10(b) of the Securities Exchange Act of 1934 on behalf of those persons who purchased the common stock and debentures of Southeast during the Class Period. On September 20, 1991, Southeast filed for protection under Chapter 7 of the United States Bankruptcy Code, after its primary subsidiary, Southeast Bank, N.A., was seized by government regulators and its assets were transferred to First Union Bank in a federally assisted bail-out. Class Plaintiffs subsequently moved, and were granted leave, to file a Fourth Consolidated Amended and Supplemental Complaint which asserted claims on behalf of those persons who purchased the common stock and debentures of Southeast during the period from February 27, 1989 through and including July 4, 1991.

This litigation was extremely hard fought for three and one-

half years, as evidenced by the more than 250 docket entries contained in the record index. On August 19, 1993, a Stipulation of Settlement was executed whereby the case was settled for $5,000,000 in cash, plus interest accrued thereon. Plaintiffs' Counsel (who had incurred over $975,500 in attorneys' time prior to the appeal) petitioned for an award of counsels' fees in the amount of $1,250,000, or 25% of the settlement fund, pursuant to controlling Eleventh Circuit law as set forth in *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991). The settlement and the fee were approved over the objections of Petitioner, who was the only objector to any part of the settlement or fee request, notwithstanding the fact that more than 47,500 notices were mailed to Class members, as well as nominees and brokers.[3]

After extensive litigation in the district court, a settlement was reached. Competing claims had been filed by Petitioner (in his alternate role as Trustee) and others, including the Federal Deposit Insurance Corporation and the Resolution Trust Corporation, that — together with mounting defense costs —

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3. The settlement and fee petition were supported by extensive memoranda as well as the sworn affidavits of Plaintiffs' Counsel, which included detailed time summaries, broken down by each attorney who worked on the case, as well as the types of activity performed. *See* R10-221-1, R11-235-1. Further, in Plaintiffs' Reply Memorandum in Support of Plaintiffs' Counsels' Joint Petition for an Award of Attorneys' Fees and Reimbursement of Expenses, Class Plaintiffs specifically responded to Petitioner's objections, noted that he relied on inapplicable authority which did not concern common fund fee awards, questioned Petitioner's standing as well as his motives given his conflicting loyalties as both Trustee of the Chapter 7 estate of Southeast and Administrator of the Plan, and pointed out that his demand to inspect Counsel's underlying time records ran counter to the Eleventh Circuit's mandate in *Camden* that "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." 946 F.2d at 774. Resp. App. at 1a-26a. Citation to "Resp. App. at _____" refers to the appendix to this Brief in Opposition.

threatened to deplete the available directors' and officers' liability insurance which, upon the collapse of Southeast, offered the only meaningful source of recovery in this litigation as well as for the competing actions. In the face of the numerous competing claims, the seizure of Southeast Bank, the absence of any other real source of recovery for the Class, and in light of a damage analysis, based upon data evaluated by Plaintiffs' financial expert, of approximately $26 million (assuming Plaintiffs established the Defendants' liability), Plaintiffs' Counsel, after months of settlement negotiations, negotiated a $5 million cash settlement. Of that amount, and following more than three years of litigation for which they did not receive any payment, Plaintiffs' Counsel requested 25% of the settlement fund, the "benchmark" identified by the Eleventh Circuit in *Camden*, as attorney's fees.

The notice program included publication in the *Miami Herald* and *The Wall Street Journal* and the mailing of over 47,500 copies of the Class Notice.[4] This notice program elicited a

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4. Contrary to Petitioner's assertion, Rule 23(e) does not require that, in the settlement of Rule 23(b)(3) and 23.1 class and shareholder derivative actions, all absent class members be "summoned into court." Cert. Pet. p.11. Rather, Rule 23(e), which only applies to class actions, provides that, a class action shall not be dismissed or compromised without the approval of the court, and that notice of any proposed dismissal or compromise "shall be given to all members of the class in such manner as the court directs." In accordance with the provisions of Rule 23(c)(2) and (e) and the district court's Order pursuant thereto, Class members were given notice of the proposed settlement and the Settlement Hearing, as well as their right to seek exclusion (opt out) from the Class, and the *opportunity* to appear and be heard in support of or in opposition to the settlement. No one was "summoned into court." *See* Notice of Pendency of Class Action, Proposed Settlement, Settlement Hearing, and Right to Appear and Notice to Nominees, Resp. App. at 27a-30a, 34a-38a, 44a-47a.

total of one objection — that of the Petitioner — to any part of the settlement or fee request.[5]

At what the district court characterized as "11:59," R13-46, Petitioner's Counsel appeared at the November 15, 1993, Settlement Hearing on behalf of the Trustee of the estate of Southeast, R13-27, challenged the fee request, demanded to see Plaintiffs' Counsel's underlying time records and damage analysis and questioned the negotiation process. R13-40. At the Settlement Hearing, during which the district court heard extensive argument from Petitioner's Counsel, the district judge noted his personal familiarity with the case and the negotiation process which culminated in the settlement, his satisfaction with the record in so far as it supported the settlement and the fee petition, and stated that, in his opinion, this was a "very good settlement for all parties." R13-43-44, 50, 52, 54, 55. In an order dated November 23, 1993, the district court approved the settlement and Plaintiffs' Counsel's fee request.[6]

Petitioner objected at the Settlement Hearing and filed papers in opposition to the settlement, but never bothered to intervene under Rule 24. Upon the filing of their answer brief in the Eleventh Circuit, Class Plaintiffs pointed out, *inter alia,* that the Petitioner lacked standing to prosecute this appeal by reason

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5. Petitioner never objected to the Notice in the district court, nor did he assert any denial of due process until the filing of his Petition for Rehearing and Suggestion for Rehearing *En Banc* in the Eleventh Circuit.

6. Petitioner's unwarranted claim that the district court "rubber stamped" the proposed settlement, Cert. Pet. p.3, is belied by the record below, particularly the district judge's statements at the Settlement Hearing as to his own familiarity with this action as well as the extensive briefing with respect to the settlement and Petitioner's objections thereto, and the lengthy Settlement Hearing at which Petitioner was given a full and fair opportunity to appear and be heard.

of his failure to formally intervene under Rule 24.[7] The Eleventh Circuit agreed and summarily dismissed the appeal based upon the clear precedent set forth in *Guthrie*. Pet. App. at 1a-2a.[8]

REASONS FOR DENYING THE WRIT

I.

THERE ARE NO "COMPELLING REASONS" FOR THE GRANTING OF A WRIT OF CERTIORARI.

There are no "compelling reasons" for the granting of a Writ of Certiorari in this case as required by Rule 10 of the Rules of this Court. The principal argument advanced by Petitioner for the granting of a Writ of Certiorari is that a conflict exists among the Circuits as to the requirement to intervene under Rule 24 as a party to the litigation in order to have standing to appeal a final order in a class action brought pursuant to Rule 23(b)(3). There is hardly a conflict among the Circuits on this issue. Indeed, every Circuit that has squarely addressed this issue since 1987 has adopted the same holding as *Guthrie* in the context of a Rule 23 class action. There is no court that has specifically addressed the question presented here and decided the issue in a manner contrary to *Guthrie*. The decisions on which Petitioner relies to create some "conflict" on this procedural question are cases in which the issue was simply never addressed; discussed only in *dicta*; or decided in the context, not of a Rule 23(b)(3) class

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7. Since a single judge on a motion calendar is without authority to dismiss an appeal pursuant to Rule 27(c) Fed. R. App. P., the Appellee's Brief was the appropriate time to raise the fact that the Appellant had failed to follow the clearly articulated holding of prior Eleventh Circuit case law by not intervening pursuant to Rule 24.

8. Citation to "Pet. App. at ____" refers to the appendix to the Petition for a Writ of Certiorari.

action, but of a shareholder derivative action brought under Rule 23.1, where the shareholder has no claim independent of the corporation and is not given the opportunity to opt out, or Rule 23(b)(1) or (2) class actions where there is, similarly, no right to opt out.[9]

Neither Petitioner's mischaracterization of the factual background of the settlement, nor his untimely due process arguments provide grounds for certiorari review. This case was settled after extensive, hard-fought litigation, when the parties and the district judge were in a position to evaluate the merits of the case and the settlement. At the eleventh hour, Petitioner, who is also the Trustee of the bankruptcy estate of Southeast and who was spearheading a competing claim to that of the Class Plaintiffs, appeared and objected to the settlement for reasons known only by Petitioner. Proper notice of the settlement was afforded Petitioner, who was represented by counsel, yet failed to either intervene in the action or opt out of the Class, and is thus bound by the district court's final judgment. Petitioner's rhetoric does not change that fact, or in any way suggest a basis for further review.

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9. Petitioner attempts to draw a "determinative" distinction between Rule 23(b)(1) & (2) class actions on one hand, and Rule 23(b)(3) and 23.1 class and shareholder derivative actions on the other, based upon the fact that the latter cannot be settled without notice to absent class members and a hearing on their objections, if any, to the proposed settlement. Cert. Pet. p.3. This is not the relevant distinction in this case. Rather, a fundamental difference exists between Rule 23(b)(3) class actions and all other class categories *including* Rule 23.1 shareholder derivative actions, because the latter do not allow for class members to opt out of a settlement, thus eliminating one of the rationales underlying *Guthrie*. Apparently, Petitioner seeks to lump Rule 23(b)(3) and 23.1 actions together because Petitioner's argument that certain Circuits adhere to the theory that intervention is not required relies upon cases which involve Rule 23.1 derivative actions.

II.

THERE IS NO MAJOR CONFLICT AMONG THE CIRCUITS, AND THIS COURT HAS THREE TIMES REJECTED CERTIORARI PETITIONS ON CASES RAISING THE SAME ISSUES ADVANCED BY PETITIONER.

This Court has consistently denied certiorari in cases which presented the same standing issue on which Petitioner seeks certiorari review. *See Bramon v. Barnett Banks, Inc.*, 38 F.3d 572 (11th Cir. 1994), *cert. denied,* 15 S. Ct. 1824 (1995); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992), *cert. denied,* 113 S. Ct. 1251 (1993); *Shores v. Sklar,* 844 F.2d 1485 (11th Cir. 1988), *cert. denied,* 493 U.S. 1045 (1990). This suggests that the issues advanced by Petitioner are not "compelling" within the meaning of Supreme Court Rule 10 and that the conflict described by Petitioner is neither as real nor as significant as Petitioner suggests.

A. Subsequent to *Marino v. Ortiz*, the Circuit Courts are Unanimous in the View that Intervention Under Rule 24 is Required to Obtain Standing to Appeal a Final Order Approving a Class Action Settlement.

In *Marino v. Ortiz*, 484 U.S. 301 (1988), this Court was faced with an appeal from a final hearing approving a consent decree in settlement of an action brought under Title VII of the Civil Rights Act of 1964. The action was brought on behalf of Black and Hispanic police officers. The petitioners, while not absent class members, were officers who would be affected by the final judgment in the case and, thus, had a legally cognizable interest at stake. The petitioners had failed to intervene, but had presented their objections to the district court. This Court held that "since petitioners were not parties to the lawsuit, and because they failed

to intervene for purposes of appeal, they may not appeal the consent decree." 484 U.S. at 304. In doing so, this Court adhered to the rule that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Id.* (citations omitted.) This Court went on to note that, while the Court of Appeals had suggested there may exceptions to this rule, ". . . We think the better practice is for such a non-party to seek intervention." 484 U.S. at 305.

Petitioner's suggestion that this Court's holding in *Marino* has created "confusion" and has been "taken out of context" to support the principle that unnamed Rule 23(b)(3) class members must intervene in addition to objecting in order to have standing to appeal (Cert. Pet. p.16), has been rejected by the Courts of Appeals and this Court. In *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992), the Eight Circuit, in holding that an unnamed class member could not appeal, even though it objected to the settlement agreement, because it had failed to intervene, stated, "We agree with *Guthrie* that *Marino* provides substantial support for holding that unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so." *Id.* at 679. Upon application for certiorari review of the court's holding in *Croyden*, that *Marino* does support the theory that unnamed class members must intervene in addition to objecting in order to have standing to appeal, this Court denied certiorari review, suggesting that neither the *Croyden* Court nor the Court in *Guthrie* was "confused" in its interpretation of *Marino*.

Similarly, *Shults v. Champion Int'l Corp.*, 35 F.3d 1056, 1060-61 (6th Cir. 1994), recognized that *Marino* "addressed the standing to appeal of non-parties and not . . . of non-representative members of a class or derivative suit." *Id.* However, based upon the reasoning set forth in *Marino*, the Sixth Circuit came to the logical conclusion that, "Similarly, merely the

interest of unnamed, non-intervening class members in the outcome of the class litigation is insufficient to confer standing upon them, even if they voluntarily make their interests known, through objections, to the district court. . . . *Marino* supports the notion that persons who are not proper parties should overcome some additional hurdle before attaining, for purposes of appeal, party status." *Id.*

In the year prior to this Court's holding in *Marino*, the Eleventh Circuit in *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), held that in order to preserve the right to appeal from a class action settlement, a class member must formally intervene under Rule 24. Subsequent to this Court's holding in *Marino*, every Circuit Court that has addressed this issue has held that, absent intervention, a non-party class member has no standing to appeal. *See Shults v. Champion Int'l Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop's, Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Shores v. Sklar*, 844 F.2d 1485 (11th Cir. 1988); as well as the court below in *In re Southeast Banking Corp. Securities Litigation*, 51 F.3d 1003 (11th Cir. 1985). In addition, the Seventh Circuit in *In the Matter of VMS Limited Partnership Securities Litigation*, 976 F.2d 362, 368 (7th Cir. 1992), found "*Guthrie's* analysis persuasive where an unnamed class member . . . is appealing a post-settlement order implementing the settlement agreement." *Id.*[10]

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10. Petitioner's reliance upon *Rosenbaum v. MacAllister*, 64 F.3d 1439 (10th Cir. 1995), does not support certiorari review. *Rosenbaum* did not overturn *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993), wherein the Tenth Circuit, "joined circuits that require intervention by a class member in a Rule 23(b)(3) case in order to have standing to appeal the district court's approval of the settlement." *Rosenbaum*, 64 F.3d at 1440. Additionally, the rationale set

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Contrary to Petitioner's assertion, the issue of whether an unnamed, but timely objecting member of a Rule 23(b)(3) class action may appeal the district court's approval of the settlement without intervention is not "unsettled." Post-*Guthrie* and *Marino*, there has been virtually no contrary view on this issue in the context of a class action settlement. In order to appeal a final judgment approving a class action settlement, one must take the relatively simply step of intervening under Rule 24 as a party plaintiff.

The rationale of *Guthrie* and subsequent cases is clear and well-reasoned. Rule 23 establishes a procedure whereby a class representative acts as a fiduciary on behalf of the class. Further, under Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members. An individual who has some interest in the outcome of litigation, but does not assume the fiduciary responsibilities of the class representative, and is not certified as such by the court, cannot act on behalf of the class. The notion of non-parties bringing appeals, often when they take interest in the litigation only at its conclusion, is contrary to the framework for representative litigation set forth in Rule 23. Just as merely having an interest in the outcome of litigation was held by this Court in *Marino* to be

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forth in *Rosenbaum* to justify a non-named class member's appeal of an attorneys' fee award does not withstand close scrutiny. For instance, the court theorized that, "should the dissident's appeal succeed in reducing attorneys' fees, there would be additional funds for later distribution to the class members." However, it did not take into consideration the potential enormous costs of such a redistribution in the context of a large shareholder action or how those costs would be paid. Further, the court's speculation that named plaintiffs could be biased in favor of their counsel and agree to what could be an excessive fee award, the excess portion of which would otherwise go to the class, ignores the fiduciary nature of the procedural framework of Rule 23 and, renders meaningless the district court's role in determining adequacy of representation. *Rosenbaum* does not provide support for Petitioner's position.

insufficient to confer standing, "merely the interest of unnamed, non-intervening class members in the outcome of the class litigation is insufficient to confer standing upon them." *Shults*, 35 F.3d at 1060.

Class members have adequate procedures under the Federal Rules of Civil Procedure to protect their substantive rights. As *Guthrie* and subsequent cases point out, class members may intervene under Rule 24 by filing a motion for intervention in the district court. The denial of such a motion is appealable. A second alternative is that a class member, if dissatisfied with the representation in the class action, may pursue a collateral proceeding. A third option is that a class member may simply opt out of the class under Rule 23(c)(2) and, thereby, not be bound by any final adjudication. *Guthrie*, 815 F.2d at 628. These are ample means of protecting the substantive rights of absent class members.[11]

If unnamed class members who have not intervened as

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11. Some of the authorities relied on by Petitioner are inapposite because they involve non-opt out classes. As the Sixth Circuit explained in *Gottlieb v. Wiles*, 11 F.3d at 110-11:

> [C]ases holding that an unnamed plaintiff in a shareholder derivative suit under Rule 23.1 has standing to appeal are inapposite . . . . Rule 23.1 does not offer the same protective mechanisms offered by Rule 23. Unlike class actions under Rule 23, in shareholder derivative suits under 23.1, a preliminary affirmative determination that the named plaintiffs will fairly and adequately represent the interests of the other class members is not a prerequisite to the maintenance of the action . . . . In addition, there is no opt out provision in shareholder derivative suits. Thus, all shareholders are bound by the outcome regardless of their objections.

parties could initiate appellate proceedings without formally becoming parties, class actions would become unmanageable. "A fundamental purpose of the class action is to render manageable litigation that involves numerous members of a homogenous class . . . ." *Guthrie,* 815 F.2d at 629. When procedural protections afforded class members under Rules 23 and 24 are balanced against the specter of unwieldy litigation and the loss of manageability in class litigation, there is no question that the balance tips in favor of precluding appeals by those who have failed to take the simple step of intervention:

> If individual appeals without formal intervention were permitted, the class action would break down under the burden of unpredictable and unlimited individual actions. Such a result would directly conflict with the goals of Rule 23 and would eviscerate the utility of the class action suit.

Gottlieb v. Wiles, 11 F.3d at 1009.

This Court squarely held in *Marino,* that the right to bring appellate review of an adverse judgment is limited to a party. The better practice is to adhere to that limitation in the class context, particularly in light of the procedures whereby one can relatively easily become a party through intervention and, if necessary, appeal the denial of the requested intervention.

B. Petitioner's Claimed Conflict Among the Circuits is Illusory.

Petitioner suggests that there is a widening split among the Circuits on this issue of standing, and that the Fifth, Eighth, Tenth and Eleventh Circuits are "in direct conflict" with the Third, Sixth, Seventh and Ninth Circuits. This is simply not the case. A

careful reading of the citations advanced by Petitioner reveals no such conflict.

1. Ninth Circuit

Although Petitioner asserts that the Ninth Circuit has "established that an unnamed class member has standing to appeal a settlement agreement," Cert. Pet. p.13, the fact is that there has been no post-*Guthrie/Marino* decision in the Ninth Circuit which squarely deals with this issue. *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977), was decided a decade before *Guthrie* and *Marino*, and did not squarely address the question of whether intervention under Rule 24 is required to obtain standing to appeal a class action settlement. *Marshall* arose out of a settlement of a class action involving a pyramid scheme. Numerous class actions with differing and somewhat conflicting definitions of the class were consolidated into one action. After the case was settled, an appeal was brought by an entity sued as a defendant in one case, but also part of a defined plaintiff class in another. While it was appellants' status as class members that ultimately served as a basis for standing to appeal, the issue of whether formal intervention under Rule 24 was required was never raised by the parties or addressed by the Court.[12]

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12. The *Marshall* court ultimately rejected the appellants' argument that they were not adequately represented, stating:

> Appellants had the right and opportunity to opt out in this action. They chose not to. We believe that they should not now be allowed to play the role of spoilers for a class of more than 31,000 people when they could have chosen not to be bound by the settlement.

550 F.2d at 1177.

Similarly, in *In re Cement Antitrust Litigation*, 688 F.2d 1297 (9th Cir. 1982), another pre-*Guthrie/Marino* decision, which concerned a multidistrict antitrust class action wherein the plaintiffs sought a writ of mandamus with respect to the district judge's recusal, the court specifically stated, "We need not decide the general question whether class members are in fact 'parties' to a class action suit .... Here, we need decide only if, for purposes of [28 U.S.C.] section 455, stock ownership in a class member constitutes an interest in a 'party to the proceeding.' " *Id.* at 1310. The issue of intervention was neither raised nor decided. *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295 (9th Cir. 1981), also a pre-*Guthrie/Marino* decision, involved a discrimination action brought pursuant to Rule 23(b)(2) which does not require that unnamed plaintiffs be allowed to opt out. Thus, the Court's statement in dicta that the unnamed class member who appeared and objected to the settlement could have challenged the settlement by direct appeal is neither significant nor relevant.[13]

Finally, *Silber v. Mabon*, 957 F.2d 697 (9th Cir. 1992), the only post-*Guthrie/Marino* Ninth Circuit authority cited by Petitioner, involved an appeal by an unnamed class member of the district court's denial of his motion to opt out of the settlement of a securities action. In *Silber* the class member received notice too late to opt out, as he desired, but in time for the Rule

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13. The fact that the *Dosier* court, in making this statement relied upon *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059, 1060 (7th Cir. 1970) is, however, significant. As discussed *infra*, Respondents submit that the *Asgrow* court's statement that one who intervenes, or "even appears in response to a notice," may maintain an appeal, referred to the non-opt out class claims under Rule 23(b)(1) and (2), which were asserted in that case and not the Rule 23(b)(3) claims. *Dosier* supports this interpretation, and contradicts Petitioner's assertion that, as opposed to class members in a 23(b)(3) class action, "class members in Rule 23(b)(1)&(2) actions need to intervene pursuant to Rule 24 if they wish to appear before a district court for any purpose." Cert. Pet. p.3.

23(c)(2)(C) hearing. The *Silber* court did not, as Petitioner contends, hold that as long as an unnamed Rule 23(b)(3) class member appears in response to a notice of hearing of proposed settlement and puts forth his objections, he can attack the dismissal or compromise on appeal. Rather, the court found that, because one of the protective mechanisms of Rule 23 was not heeded, (in that case adequate notice) "Appellant might have more properly moved the district court for relief from the proceedings pursuant to Fed.R.Civ.P. 60(b)(4) on the grounds that the proposed settlement was void as to him . . . . [W]e find no barrier to construing what was done as in effect a 60(b)(4) motion made pursuant to that provision," 957 F.2d at 700, and allowed the appeal on that basis. The court in *Silber* never addressed the issue of intervention.[14]

2. Seventh Circuit

The notion that the Seventh Circuit law conflicts with the prevailing view articulated in *Guthrie* is also highly questionable. Petitioner cites a 1970 opinion of the Seventh Circuit, *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970), in support of the view that the Seventh Circuit does not require formal intervention to obtain standing to appeal. However, a review of that opinion, and subsequent opinions that have considered it, reveals that Petitioner's interpretation is incorrect.

Asgrow arose out of a consent judgment as to the validity of a patent and an infringement of that patent, and an antitrust action. The antitrust action was maintained as a class action under Rule 23(b)(3), from which there is a right to opt out. The infringement action was maintained as a class action under Rule 23(b)(1) and

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14. In the instant case, Petitioner never challenged of Notice in the district court and never attempted to opt out of the class.

(2), from which there is no right to opt out. With respect to the antitrust action, the Court specifically stated:

> We need not consider the factual questions concerning the degree of participation by appellants in the settlement hearing and negotiations *since the failure of appellants to formally intervene, after receipt of notice under Fed.R.Civ.P. 23(e) before final judgment forecloses their right to appeal.*

Asgrow, 425 F.2d at 1060, n.2 (emphasis added). *Asgrow* is consistent with *Guthrie* on this issue. While confusion in the reading of *Asgrow* arises from a further statement by the court with respect to the non-opt out class claims under Rule 23(b)(1) and (2) that one who intervenes or "even appears in response to a notice," may maintain an appeal, the above language is clear on the issue of the need to intervene.

In *Gottlieb v. Wiles,* 11 F.3d 1004 (10th Cir. 1993), the Tenth Circuit squarely pointed out that *Asgrow* did not support the notion that formal intervention was not required. After pointing to the above-quoted *Asgrow* footnote, the court in *Gottlieb* stated:

> Thus, in the only portion of the *Asgrow* decision directly parallel to the situation in this case, the Seventh Circuit held that formal intervention was a prerequisite to the right of appeal.

11 F.3d at 1011. As the *Gottlieb* court noted, *Asgrow* stands for the same proposition as *Guthrie* in the context of a Rule 23(b)(3) class.

Further, the other Seventh Circuit authorities relied upon by

Petitioner for his argument that *Asgrow* is contrary to *Guthrie*, demonstrate that Petitioner's reliance is misplaced. The most recent Seventh Circuit decision cited by Petitioner suggests that the Seventh Circuit is likely to follow *Guthrie* if squarely confronted with this issue. In *In the Matter of VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992), a Seventh Circuit panel appeared reluctant to depart from what it construed as the Circuit's prior holding in *Asgrow*, but failed to apply *Asgrow* so as to permit an appeal from a class member who had not intervened. After citing *Guthrie* and finding that its reasoning was "persuasive," the court in *VMS* held that an unnamed class member who had failed to intervene could not appeal a post-judgment order implementing the settlement agreement. The Seventh Circuit's opinion in *VMS* reflects a clear departure from any notion that a class member who fails to formally intervene has standing to bring an appeal.

Tryforos v. Icarian Development Co., S.A., 518 F.2d 1258 (7th Cir. 1975), *cert. denied*, 423 U.S. 1091 (1976), also supports the interpretation that the language appearing in the body of the *Asgrow* opinion applies only to non-opt out classes. Petitioner incorrectly paraphrases the Court's holding. What the *Tryforos* court actually stated in footnote 22 is, "The law is clear that a non-party shareholder who appears, *pursuant to a Rule 23.1 notice*, to present objections to a proposed dismissal or settlement of a derivative action may appeal an adverse decision even though he has not been formally made a party to the action." 518 F.2d at 1263, n.22 (emphasis added). Similarly, *Armstrong v. Board of School Directors*, 616 F.2d 305 (7th Cir. 1980), involved a non-opt out class action brought pursuant to Rule 23(b)(2).

No Seventh Circuit opinion has held that an unnamed class member in a Rule 23(b)(3) class action need not intervene in order to have standing to appeal an adverse final judgment. Indeed, *Asgrow*, like *Guthrie*, stands for the opposite proposition.

3. Sixth Circuit

Petitioner's assertion that the Sixth Circuit adheres to the axiom that an unnamed class member who objects to a settlement agreement has standing to appeal all aspects of the agreement is simply unsupportable. In *Shults v. Champion Int'l Corp.*, 35 F.3d 1056 (6th Cir. 1994), the court, after discussing *Guthrie* in detail, and noting that it "appears to be the progenitor of the modern trend" with respect to non-named individual class members who seek to appeal, clearly held that, "A non-named class member has standing to appeal a settlement order *if he has formally intervened in the action* . . . ." *Id.* at 1061. (emphasis added). The court went on to delineate two exceptions to the mandatory intervention rule, stating:

> However, a non-named party that has not been permitted to intervene may also have standing to bring a direct appeal if a motion to intervene, which is then appealed, should have been granted. A non-named party may also have standing to appeal if the district court has otherwise "summoned" him into court. Of course, as the Supreme Court has indicated, "the better practice is...to seek intervention for purposes of appeal."

Id. at 1061 (*quoting Marino v. Ortiz*, 484 U.S. 301, 304 (1988)).[15]

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15. The two exceptions to the mandatory intervention rule cited in *Shults* stem from two pre-*Guthrie/Marino* Sixth Circuit opinions, *Sertic v. Carpenters Dist. Counsel*, 459 F.2d 579 (6th Cir. 1972), and *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942). In *Cohen*, an unnamed class member "received an order in a class shareholder derivative suit to show cause why a proposed settlement should not be approved by the district court." *Shults*, 35 F.3d at 1059. The class member appeared at the hearing, objected to the settlement, and petitioned to intervene as a plaintiff, which petition was denied. The class

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Petitioner's assertion that the notice required in a Rule 23(b)(3) class action is the equivalent of being "summoned into court" (and therefore tantamount to some mandatory intervention) is disingenuous at best. In fact, the Sixth Circuit in *Shults*, after noting that the notices at issue there, like the notice in the instant action, provided that a class member "may" appear at the settlement hearing, either on his own behalf or through counsel of his own choice, specifically rejected this notion:[16]

> The appellants have not intervened in this action. Nor did they seek to intervene. Further, the notices in this case do not satisfy the requirement in *Cohen* that the appellants be haled into court. The district court allowed, pursuant to Rule 23(e), for their appearance to make objections. However, as

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member appealed the order approving the settlement, but not the order denying him intervention. The Sixth Circuit held that the appellant's appearance in court pursuant to a "notice to show cause why the settlement should not be approved" was "like a defendant who is summoned by process of court and after an adverse ruling has the right to appeal." *Cohen*, 127 F.2d at 724 (citations omitted). The *Shults* court thus determined that "under *Cohen*, an unnamed member of a derivative suit who has not been allowed to intervene may nonetheless have standing to appeal if the district court has haled him into court." 35 F.3d at 1060.

In *Sertic*, non-named class members whose petitions to intervene had been denied by the district court, had standing to appeal, because, "the appellants who were successful in their appeal of the denial of their petitions to intervene, were essentially intervening parties and accordingly had the rights of such parties, including the right to appeal an adverse final judgment." *Shults*, 35 F.3d at 1060.

16. The Notice sent to Class members herein also allowed for their appearance on a non-mandatory basis. *See* Resp. App. 46a-47a.

> explicitly stated in the first notice, their appearance was not of a mandatory nature. We are hard pressed to say that the appellants here were like defendants "summoned by process of court." *Cohen*, 127 F.2d at 724. Therefore, the appellants lack standing to bring this appeal because, by not intervening in this action below and not seeking to intervene, they have not satisfied the requirements of *Sertic*, and because the record indicates that the requirements of *Cohen* have not been satisfied.

35 F.3d at 1061.[17]

It cannot, in good faith, be argued that the Sixth Circuit is in "direct conflict" with the Eleventh Circuit and other Circuits which have held that unnamed class members generally lack standing to appeal class settlements.

4. Third Circuit

Finally, Petitioner's assertion that the Third Circuit has rejected the *Guthrie* approach is also suspect. While Third

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17. The Sixth Circuit in *Shults* further stated:

> We note, too, that the *Cohen* requirement is in accord with the public policies identified in and underlying *Guthrie* and subsequent cases. . . . [B]ecause the manageability of class litigation depends, at least in part, on the absence of numerous individual and divergent interests, those interests must do more than merely appear and object in order to have standing to appeal.

35 F.3d at 1060.

Circuit case law suggests a Third Circuit panel might well rule contrary to *Guthrie* in the context of a class action, no Third Circuit panel has squarely done so.

In *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3d Cir. 1993), several class members moved to intervene following certification of the class in an asbestos case. The court denied both intervention as of right under Rule 24(a) and permissive intervention under Rule 24(b). The proposed intervenors then took an immediate appeal. The Third Circuit dismissed the interlocutory appeal on the theory that, under its prior holding in *Ace Heating & Plumbing, Inc. v. Crane*, 453 F.2d 30 (3d Cir. 1971), the class members who had been denied intervention would later have the right to appeal from any settlement in the case. The *Carlough* court in *dicta*, sought to distinguish the contrary holdings in *Croyden*, *Guthrie* and *Walker*,[18] so as to suggest that an appeal would be available absent intervention. The *Carlough* case stands for the proposition that the denial of intervention cannot be addressed on an interlocutory appeal. The panel in *Carlough* seemed to accept, without really analyzing, the notion that *Ace Heating* holds that one need not seek to intervene as a party to obtain rights to appeal a class action settlement, and did not address whether such a rule makes sense.[19]

Petitioner also relies on *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993). That case arose out of a shareholder derivative action, not a class action. The Third Circuit held that an objector to a shareholder derivative action brought pursuant to Rule 23.1 had standing to object to a settlement even though he

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18. *Gottlieb* and *Shults* had not yet been decided.

19. In fact, the *Ace Heating* opinion did not address the issue of whether intervention under Rule 24 was required. The word "intervention" appears nowhere in the *Ace Heating* opinion, as the issue simply never came up.

did not file a motion to intervene in the district court. While Petitioner suggests that the distinction between a class action and a derivative action is not a meaningful one in the standing analysis, the Third Circuit panel in *Bell Atlantic* clearly recognized that that is not the case. In a footnote, the court noted that, "[I]n derivative suits, unlike shareholder class actions, recoveries belong to the corporation on whose behalf the suit was brought." 2 F.3d at 1307, n.4. The plaintiff in a Rule 23 class action has a personal claim that can be prosecuted outside the context of the class case. The court in *Bell Atlantic* pointed out that at least one rationale offered in support of the intervention requirement does not apply to derivative cases. Specifically, the court noted that in a Rule 23(b)(3) class action a shareholder has a right to opt out of the class and bring his own separate action. *Id.* In a derivative action, the named plaintiff acts solely as a representative for the corporate entity and has no individual stake or claim that can be pursued independently. The Plaintiff in a class action has an individual economic stake in the outcome, because the recovery on a damage claim is paid to the members of the class. In a derivative case, a shareholder who has no monetary interest in the outcome of the case would have little incentive to intervene in an on-going lawsuit. Thus, the factors noted in *Guthrie* as to Rule 23's protections of substantive rights have no application in the context of a derivative case.[20]

In summary, there is no clear or compelling conflict between the Circuits as Petitioner suggests. Petitioner concedes that the Fifth, Eighth, Tenth and Eleventh Circuits all, consistent with *Guthrie,* have held that an unnamed class member who has not intervened in the action lacks standing to appeal an order

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20. The *Bell Atlantic* opinion is also significant in its characterization of *Ace Heating & Plumbing*. Unlike *Carlough*, the court in *Bell Atlantic* noted only that "it is suggested" in *Ace Heating & Plumbing* that an objecting class member need not intervene to protect the right to appeal. *Bell Atlantic*, 2 F.3d at 1309.

approving a settlement. Cert. Pet. pp.7,14. Further, the Sixth Circuit's approach, as set forth in *Shults*, is in accord with the public policies identified in and underlying *Guthrie* and its progeny. The Seventh Circuit is at least leaning in the direction of *Guthrie* as evidenced by *VMS*, and because a close reading of the *Asgrow* opinion suggests that that Circuit's view is actually consistent with *Guthrie*. Finally, the Ninth Circuit does not represent a countervailing view, since the issue of intervention in the same context as the instant action has not been raised or decided. At most, it may be said that the Third Circuit appears to be leaning in a direction contrary to *Guthrie*.

III.

THE APPLICATION OF THE RULE OF *GUTHRIE* DID NOT DEPRIVE PETITIONER OF DUE PROCESS.

Petitioner has not been denied due process by virtue of the Eleventh Circuit's application of *Guthrie*. Petitioner was given proper notice pursuant to the mandate of Rule 23. He never objected to the Notice in the district court.[21] Rule 23(e) does not require that class members be informed of every procedural step necessary to preserve an appeal. Petitioner's argument to the contrary has been specifically rejected. *See Gottlieb v. Wiles*, 11 F.3d at 1013:

> [Objectors] further argue that the notice of the

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21. Because this issue was not timely raised by Petitioner below, it is questionable whether the issue can properly be raised before this Court. *Insurance Company of North America v. Dynamic Construction Co.*, 1995 U.S. App. Lexis 525 (6th Cir. 1995) (Where appellant did not raise issue until motion for reconsideration, issue was raised too late to be preserved for appeal.); *Midway Finance Corp. v. Walters*, 1992 U.S. App. Lexis 32229 (9th Cir. 1992) (same with respect to issue first raised in a motion made after the entry of the district court's final judgment).

> settlement was constitutionally deficient because it failed to inform the class members of the need to intervene in order to preserve their right to appeal from the approval of the settlement .... Rule 23(e) requires only notice of the proposed dismissal or compromise, not a tutorial on the Rules of Civil Procedure.

Moreover, Petitioner's citations in support of the general principal that a party affected by a final order has standing to appeal such order are inapposite to this action.[22] Petitioner acknowledges that there is an exception to the general rule that a judgment or decree among parties to a lawsuit resolves issues among them, but does not conclude the rights of strangers to those proceedings, where "the non-party is otherwise adequately represented." Cert. Pet. p.19. Among the specific exceptions set forth by this Court in *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) are "class" or "representative" suits. *Id.* (*citing Hansberry v. Lee*, 311 U.S. 32, 41-42 (1940)).

There is a very good reason why class actions are exempt from the general rule. It is because the Federal Rules of Civil Procedure impose procedural regulations on the class action not applicable to any other. The mechanics of Rule 23 assure that class members are afforded minimal due process. If a class action is maintained under subsection (b)(3), minimum due process is guaranteed through the requirements of subsection (c)(2). The class is entitled to notice, as well as the right to opt out of the litigation and not be bound by the class judgment. If class

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22. In fact, the court in *Concorde Resources, Inc. v. Woosley (In re: Woosley)*, 855 F.2d 687 (10th Cir. 1988), relied upon by Petitioner, specifically noted that, "a 'non-party does not have standing to appeal in the absence of most extraordinary circumstances.' " *Id.* at 687 (citations omitted).

members decide to stay in, the Court must still determine whether they would be adequately represented under Rule 23(a)(4). *See* Fed. R. Civ. P. 23, Notes of Advisory Committee, 1966 Amendment ("This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2) is designed to fulfill requirements of due process . . . ."). Because of the various procedural safeguards built into Rule 23(b)(3), as well as the collateral proceedings available to an unnamed class member, as set forth in *Guthrie,* 815 F.2d at 628, requiring a class member, especially one who is represented by counsel, to take the relatively easy step of intervening in an action does not, as Petitioner suggests, "severely impair the due process rights of unnamed class members." Cert. Pet. p.19.

Petitioner is incorrect in his assertion that "only through an appeal and a substantive review of the district court's decision can an appellate court determine whether an unnamed Rule 23(b)(3) . . . class member has become a stranger vis-a-vis the settlement." *Id.* That determination is neither available to Petitioner nor appropriate here. Petitioner had his interests "adequately represented by someone with the same interests who is a party," in this class action. *Martin v. Wilks,* 490 U.S. at 762 n.2. Petitioner never complained of inadequate representation.

Where, as here, the unnamed class member never bothered to intervene, never objected to the notice in the district court, and only became involved in the action at the "eleventh hour,"[23] and where the record indicates the district court judge's familiarity

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23. As the district court stated to Petitioner's Counsel at the Settlement Hearing:

> Where were you, representing your client, in all of those prior hearings when this record was being made?

R13-46.

with the litigation, such second guessing of the district court's determination would simply vitiate the court's role in class litigation and render the representative framework of Rule 23 meaningless. Petitioner was afforded full due process.

CONCLUSION

Petitioner has not demonstrated any true split among the Circuits. Petitioner simply failed to follow clear Eleventh Circuit precedent that required him to intervene in order to establish the right to prolong this litigation through appeals. For the reasons stated above, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — PLAINTIFFS' REPLY MEMORANDUM

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

IN RE: SOUTHEAST BANKING CORP. SECURITIES LITIGATION

MASTER FILE
CIVIL ACTION NO.
90-0760-CIV-MOORE

THIS DOCUMENT RELATES TO ALL ACTIONS

JURY TRIAL DEMANDED

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' COUNSELS' JOINT PETITION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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Appendix A

PRELIMINARY STATEMENT

William A. Brandt, Jr., as Administrator of the Investment Plus Plan (the "Plan"), of Southeast Banking Corp. ("Southeast") has filed a Memorandum of Law ("Brandt Mem.") in Opposition to Plaintiffs' Counsel's Joint Petition for an Award of Attorneys' Fees and Reimbursement of Expenses ("Joint Petition").[1] Mr. Brandt's opposition, in essence, advocates ignoring the mandate of the Eleventh Circuit as set forth in *Camden I Condominium Association, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991) ("*Camden I*"), and instead returning to the "lodestar" method of calculating attorneys' fees as set forth in *Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1974), *appeal following remand*, 540 F.2d 102 (3d Cir. 1976).

Mr. Brandt's Memorandum contains a number of misstatements of fact and is supported solely by inapplicable authority.[2] Moreover, this Court should note that the

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1. Although the Certificate of Service on Brandt's opposition Memorandum states that it was served by "regular mail" on October 31, 1993, October 31, 1993 was a Sunday and, as indicated by the envelope in which the opposition Memorandum was received (a copy of which is attached hereto as Exhibit "1"), the opposition Memorandum was postmarked on November 1, 1993. Thus, this Reply would have been due on November 11, 1993. Because November 11 is a "legal holiday" as defined in Rule 6, Fed. R. Civ. P., this Reply is being filed on Friday, November 12, 1993.

2. Before the Court attaches any credibility to the representations of Mr. Brandt's counsel herein, J. Joseph Bainton, Esquire, the Court should review the Second Circuit opinion in *Warner Brothers, Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1128 (2d Cir. 1989) in which Mr. Bainton, consistent with his conduct in this Court, was sanctioned for vexatious litigation and demonstrated his view of

(Cont'd)

Appendix A

"Administrator" is also the "Trustee in Bankruptcy" for Southeast and has filed a number of actions which seek to recover from the same sources of funds that will fund the settlement herein. Mr. Brandt has been unsuccessful to date, however, in his efforts to litigate against the former officers and directors of Southeast, and based upon his own predictions as to the value of Southeast's Estate, there is little chance that Southeast shareholders will derive any benefit at all from the activities of the Trustee. Notwithstanding this, special counsel for the Trustee, Mr. Bainton and his former law firm have been paid enormous fees by the bankrupt Estate and appear to be seeking an avenue to justify additional awards through this collateral and unjustified attack on Plaintiffs' counsel herein.[3]

Given the complete lack of legal authority to support Mr. Brandt's position, as well as the suspect motives of Mr. Brandt and his counsel, this Court should give short shrift to the

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litigation as akin to a sport. ("In this Court, as well as in the district court, attorney Bainton has demonstrated a blatant disregard of the rules and regulations which permit the judicial machinery to function smoothly. An obligation is imposed on this Court to exercise its disciplinary powers to deter such happenings in the future.")

3. Originally, J. Joseph Bainton, Esquire and the law firm of Whitman & Ransom were retained by the Trustee and approved by the bankruptcy court as special counsel to the Trustee to investigate and prosecute the Trustee's claims against former officers and directors of Southeast and against former attorneys and accountants of Southeast. Effective February 1, 1993, Whitman & Ransom determined that they could no longer represent both the Trustee and the FDIC. As a result, Mr. Bainton withdrew from Whitman & Ransom and joined Ross & Hardies which has been substituted as special counsel in place of Whitman & Ransom. *See* Whitman & Ransom's Application for Final Compensation and Reimbursement of Expenses, attached to the Joint Petition as Exhibit "L," pp. 2, 6, 7. Mr. Bainton and Ross & Hardies are representing the Trustee/Administrator in his opposition to Plaintiffs' counsel's fees herein.

objection. Plaintiffs' counsel submit, as set forth in the Joint Petition, that an award of counsel fees representing 25% of the settlement fund is reasonable under the controlling authority of this Circuit and should be approved.

I. IT IS UNCLEAR WHETHER BRANDT HAS STANDING TO OBJECT TO THE SETTLEMENT

An objector to any portion of a class action settlement has the burden of establishing that he has standing to object. *In Re: School Asbestos Litig.*, 921 F.2d 1330, 1332 (3d Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 1622 (1991). Brandt in his capacity as bankruptcy Trustee, apparently also acts as co-administrator of the Plan. It is unclear, however, whether the Plan is a member of the Class. If the Plan is not a member of the Class, there is no standing to object.

After Class counsel received Brandt's opposition to their fee petition, they sent a facsimile to counsel for the Trustee of the Plan seeking Plan documents that would disclose the scope of the Administrator's authority and the process through which stock was purchased by the Plan and allocated to its participants. (*See* Letter from Michael J. Pucillo to Sharon Dixon Dated November 9, 1993, a copy of which is attached hereto as Exhibit "2.") This information would presumably shed some light on how Plan shares were purchased, who has authority to act for the Plan, and whether Brandt has standing to object to the settlement. To date, Class counsel has not received any documents from the Plan Trustee.

Without reviewing the Plan documents, it is impossible to determine whether Brandt, as Plan Administrator (as opposed to the Plan trustee), has independent authority to object on behalf of the Plan. *See In Re: American Continental Corp./Lincoln Savings*

and Loan Sec. Litig., [Current Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶97,656 at 97,039 n.1 (D. Ariz. June 2, 1993) (where ESOP Administrator objected to the scope of the class period, Court specifically pointed out that the ESOP Plan Trustee supported and joined the Administrator's position).[4]

If the Plan did not purchase Southeast stock on the open market, or the Plan did not purchase Southeast stock during the Class Period, the Trustee has no standing.[5] *See, e.g., American Continental*, [Current Transfer Binder] Fed. Sec. L. Rep. at 97,039-40 (ESOP is part of class only if stock was "*actually* purchased" by the ESOP (as opposed to merely allocated to its participants) during the Class Period). Because Brandt has not established that the Plan is a member of the Class, he does not have standing to object to any portion of the settlement, including Plaintiffs' attorneys' fees. Brandt has not met his burden of establishing that he has authority to represent the Plan or that the Plan is a member of the Class.

II. MR. BRANDT CANNOT REPRESENT THE CLASS DUE TO HIS CONFLICTING LOYALTIES

Brandt, the sole objector to any part of the Class settlement, wears multiple hats as both Trustee of the Chapter 7 Estate of Southeast and Administrator of the Plan. Brandt cannot be permitted to switch hats whenever he chooses to pursue

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4. Significantly, the Plan Trustee, First Union National Bank of Florida, N.A., joined Brandt's Emergency Motion for an Order Adjourning the Hearing Date, but has not joined Brandt's objection to Class counsel's fee petition. Thus, because Brandt has failed to establish that the Plan Administrator (in contrast to the Plan Trustee) has the requisite authority to object on behalf of the Plan, Brandt lacks standing to object.

5. To date, the Plan has not filed a proof of claim.

conflicting and competing interest. Because lawsuits initiated by Brandt as Trustee seek damages against the same defendants as this action by the Class, and seek to recover from the same limited insurance funds available to defendants to pay damages, Brandt's true interests are in conflict with those of the Class.

This conflict becomes clear when Brandt's motion to intervene is compared to his objection. On or about October 15, 1993, Brandt, wearing his bankruptcy Trustee hat, filed a motion to intervene attacking the settlement, not because it was harmful to the Class, but because Brandt perceived it potentially could impair his ability as Trustee to recover damages in competing suits against the defendants. Thus, Brandt was effectively attacking the settlement because it provided relief to the Class potentially at his expense.[6] Now, Brandt has conveniently switched to his Administrator hat on objecting to attorneys' fees — and indirectly to the settlement — as a Class member. In a 180 degree turnaround, Brandt, as Administrator, now questions, *inter alia*, whether the $5 million settlement amount is sufficiently beneficial to the Class to warrant the awarding of the attorneys' fee requested by Class Counsel. (Brandt Mem. at 7.)

An objection raised by a class member with a conflict of interest similar to Brandt's was significantly discounted by the Court in *Podesta v. Pay Television Corp.*, No. 80 Civ. 2819 (WCC) (S.D.N.Y. Jan. 19, 1981) (a copy of *Podesta* is attached hereto as Exhibit "3"). In *Podesta*, a derivative action, the only shareholder to object to the settlement was also a "major creditor" of the corporate plaintiff. In considering the objection as part of the analysis of the "reaction of class members," the Court stated:

Needless to say, where, as here, the sole

6. Plaintiff expresses no opinion on the validity of Brandt's contention that the Class settlement may impair his claims as Trustee against the defendants.

> ***objectors to a settlement appear to be motivated by concerns extraneous and even inimical to the legitimate interests of the class, the reaction of class members must be regarded as evidencing the fairness, reasonableness and adequacy of the settlement.***

Id. (emphasis added).

The *Podesta* Court recognized that an objection by one whose interests conflict with those of the Class must be discounted, notwithstanding the objector's status as a Class member. Like the objection in *Podesta*, Brandt's objection must be viewed in light of the objector's internal conflict of interest.

The efforts of Mr. Brandt as Trustee and his counsel Mr. Bainton have, so far, been unsuccessful with respect to their claims against the former officers and directors of Southeast. Originally, Mr. Brandt filed an action on June 16, 1992 against various former officers and directors of Southeast and on September 4, 1992 the FDIC sought to intervene in that action. Mr. Brandt took the position that the claims in his complaint were claims by Southeast against its own officers and directors which belonged to the Trustee and not to the FDIC. On April 29, 1993 Magistrate Judge Linnea R. Johnson recommended dismissal of Mr. Brandt's claims noting:

> Plaintiff/Trustee's argument that the holding company is a special stockholder not subject to FIRREA is without basis in law. There is not a single bit of authority to support Plaintiff/Trustee's position.

Appendix A

See Omnibus Report and Recommendation attached hereto as Exhibit "4," p. 10. Subsequently, Judge Aronovitz in large part adopted, ratified and confirmed Magistrate Johnson's recommendation, dismissing all of Brandt's claims which were derivative and turned on acts taken by, and injury to Southeast, with one small exception. The Court stated:

> [A]s the parties have described it, a 'sliver' of Trustee's complaint remains viable. The 'sliver' that remains consists of Trustee's claims in connection with the acquisitions of the two thrift institutions, actions that, at least facially, occurred at the holding company level.

See Omnibus Order dated July 12, 1993, attached hereto as Exhibit "5," p. 8. Apparently, this "sliver" was enough to encourage Mr. Bainton and his former law firm to seek, and obtain, $580,370 for services rendered from May 1, 1992 through January 31, 1993.[7] Thereafter, notwithstanding Judge Aronovitz' Order, the Trustee subsequently filed an action against former officers and directors of Southeast *derivatively* and on behalf of the FDIC in its capacity as Receiver of Southeast Bank, N.A. and Southeast Bank of West Florida as well as separate actions against, *inter alia*, the former outside accountants of Southeast.

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7. Mr. Bainton's former law firm, Whitman & Ransom actually requested fees of $586,478.50 for that time period, with Mr. Bainton logging 127.10 hours at a rate of $310 an hour, and represented to the Bankruptcy Court in their fee petition that "although certain claims alleged against the former officers and directors have been dismissed as derivative of [Southeast Bank, N.A.'s], highly significant claims alleged have been held by Judge Aronovitz to belong to the Trustee." *See* Final Fee Application, p. 19.

Appendix A

In the instant case Plaintiffs' counsel have fought the Defendants for three-and-one-half years, and produces $5 million for the class. In notable contrast Mr. Brandt and his special counsel have filed four lawsuits, none of which has produced anything for Southeast's shareholders. Brandt and Bainton, his counsel have however been paid handsomely for their efforts. The *Miami Herald* reported on September 19, 1993 that "Southeast shareholders still have a long way to go before receiving any cash. The Trustee estimates the Estate will have about $100 million cash. There are $425 million in claims that must be paid before shareholders receive a dime." The true motivation behind the objection lodged herein is to justify additional fees to Mr. Brandt and his counsel.[8]

III. THE OBJECTIONS OF MR. BRANDT AND HIS COUNSEL ARE BASED UPON INAPPLICABLE LAW

A. BRANDT AND HIS COUNSEL IGNORE THE MANDATE OF THE ELEVENTH CIRCUIT AND ADVOCATE A LODESTAR ANALYSIS OF ATTORNEYS' FEES IN THIS COMMON FUND CASE

The various misstatements of law set forth by Mr. Brandt and his counsel Mr. Bainton in their opposition Memorandum reflect, at best, a basic misunderstanding of (1) the differences between common fund fee awards and statutory fee awards, and (2) the Eleventh Circuit's rejection of the lodestar approach and acceptance of the percentage of fund approach for the determination of attorneys' fees in common fund cases. At worst,

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8. Apparently, this is not the first time Mr. Brandt has shown poor judgment in over-litigating claims. *See Brandt v. Schal Associates, Inc.*, 960 F.2d 640, 642 (7th Cir. 1992) ("This case is an unfortunate example of why 'litigation' has taken on a bad name.").

they represent a knowing and deliberate attempt to mislead this Court as to the applicable standards for awarding attorneys' fees in this Circuit.

The Eleventh Circuit in *Camden I* held that "henceforth in this Circuit, attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the Class." 946 F.2d at 774. In making this holding, the Court relied heavily on *Court Awarded Attorneys' Fees*, Report of the Third Circuit Task Force, October 8, 1985, (Arthur R. Miller, Reporter), 108 F.R.D. 237 (1985) (the "Task Force Report"). The Task Force Report found that:

> The *Lindy* lodestar approach, or for that matter any method premised upon the number of hours expended, failed to achieve any of the stated goals in common fund cases in which the measure of the recovery is the best determinant of the reasonableness and quality of the time expended.

Camden I, 946 F.2d at 773.[9] The *Camden I* Court also relied on the Supreme Court decision in *Blum v. Stenson*, 465 U.S. 886 (1984) where the Court stated:

> Unlike the calculation of attorneys' fees under the 'common fund doctrine' where a reasonable fee is based upon a percentage of the fund bestowed on the class, a reasonable fee under §1988 reflects the amount of attorney time reasonably expended on the litigation.

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9. The Task Force concluded that the *Lindy* method was a "cumbersome, enervating, and often surrealistic process of preparing and evaluating fee petitions that now plagues the Bench and Bar . . ." 108 F.R.D. at 258.

465 U.S. at 900 n. 16. After quoting *Blum*, the Eleventh Circuit went on to note:

> The Supreme Court's assertion in *Blum* is not surprising in light of the criticism commentators and lawmakers have leveled against the lodestar and twelve factor methods in common fund cases, and more particularly, against the emphasis placed by such fee computation methods on the number of hours expended.

946 F.2d at 773.

The underlying rationale established by the Task Force Report, the Supreme Court's opinion in *Blum* and the Eleventh Circuit's opinion in *Camden I* is to reject the same burdensome focus on counsel's time characteristic of the lodestar approach that Brandt seeks to engage in here.[10] The question is *not* whether counsel's lodestar in a given case is reasonable, but whether the percentage of the fund requested as attorneys' fees is

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10. *See also Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993):

> Additionally, a percentage of the fund approach is less demanding of scarce judicial resources than the lodestar method. The lodestar method makes considerable demands upon judicial resources since it can be exceptionally difficult for a court to review attorney billing information over the life of a complex litigation and make a determination about whether the time devoted to the litigation was necessary or reasonable. . . . It is much easier to calculate a percentage of the fund fee than to review hourly billing practices over a long, complex litigation.

reasonable.[11] Thus, Mr. Brandt's and Mr. Bainton's argument that Plaintiffs' counsel must submit "proof that the number of hours spent on this matter was reasonable" (Brandt Mem., p. 8) represents a return to the very quagmire of analyzing time records that *Camden* rejected.

Virtually all of the cases relied upon by Brandt and his counsel to support their proposition are statutory fee cases where the lodestar method was used to calculate attorneys' fees. These cases have no application to this action. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("the standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' "); *Ramos v. Lamm*, 713 F.2d 546, 551 (10th Cir. 1983) (determining fees submitted by the plaintiffs pursuant to the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. §1988 and setting forth "standards for district courts to follow in this and similar cases."); *Norman v. Housing Authority of the City of Montgomery*, 836 F.2d 1292 (11th Cir. 1988)[12]; *United Slate, Tile & Composition v. G&M Roofing & Sheet Metal Co.*, 732 F.2d 495 (6th Cir. 1984) (award of statutory attorneys' fees under Fair Labor Standards Act); *Cantor v. Detroit Edison Company*, 86 F.R.D. 752 (E.D. Mich. 1980) (determination of attorneys' fees in Clayton Act Antitrust case based on lodestar analysis — "number of attorneys' hours spent multiplied by reasonable hourly rate."); *Gutierrez v. City of*

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11. Mr. Brandt and Mr. Bainton fail to note that the *Camden* Court, in an apparent attempt to avoid the kind of backsliding into the lodestar approach advocated in their opposition Memorandum, specifically held out 25% of the fund as a reasonable "benchmark" "which may be adjusted in accordance with the individual circumstances of each case, as opposed to the lodestar hourly fee used in statutory fee awards." 946 F.2d at 775.

12. In *Norman*, the Eleventh Circuit "refined its analysis for determining statutory fee awards" in favor of the lodestar approach. *Camden I*, 946 F.2d at 772.

Hialeah, 729 F.Supp. 1329 (S.D. Fla. 1990) (a Rule 11 case, not a common fund); *Dorfman v. First Boston Corp.*, 70 F.R.D. 366 (E.D. Pa. 1976) (attorneys' fees determined under the *Lindy* lodestar approach). Mr. Brandt simply cannot rely on statutory fee cases to argue fee criteria under a common fund.

Further, in a misrepresentation of *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988) *cert. denied*, 488 U.S. 822, 109 S.Ct. 66 (1988), Mr. Brandt and Mr. Bainton assert that the *Brown* opinion stands for the proposition that "attorneys' hours reasonably billed and hourly rate " 'measure the attorneys' contributions, [and] are . . . appropriate in setting and reviewing percentage fee awards in common fund cases.' " Brandt Mem. at 8. That is not true. What the Tenth Circuit actually held in *Brown* was, "Because these *factors* [set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)] measure the attorneys' contributions, they are also appropriate in setting and reviewing percentage fee awards in common fund cases." 838 F.2d at 454. Not one of the *Johnson* factors is "attorneys' hours reasonably billed and hourly rate."[13]

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13. The *Johnson* factors are:

> (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (5) any prearranged fee — this is helpful but not determinative; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d at 717-19.

More importantly, Mr. Brandt and Mr. Bainton fail to reveal that the Court in *Brown* went on to specifically state:

> Although the *Johnson* factors are relevant in determining a reasonable fee in a common fund case, the inherent differences between statutory fee and common fund cases could justify a trial judge's decision to assign different relative weights to those factors in the two types of cases. For example, the first factor — time and labor required — is an essential touchstone for recovery in a statutory fee case where reasonableness is measured in part by reference to the lodestar analysis. In a common fund case, however, although time and labor required are appropriate considerations, the ninth *Johnson* factor — the amount involved and the results obtained — may be given greater weight when, as in this case, the trial judge determines that the recovery was highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class . . . we hold here only that in awarding attorneys' fees in a common fund case, the 'time and labor involved' factor need not be evaluated using the lodestar formulation when, in the judgment of the trial court, a reasonable fee is derived by giving greater whether to other factors, the basis of which is clearly reflected in the record.

838 F.2d at 456.

Thus, because they rely on inapplicable and irrelevant authority, Mr. Brand and Mr. Bainton make the completely erroneous assertion that, in a common fund case in which fees must be computed on the percentage of the fund method, "parties must be *specific* as to the reasonableness or unreasonableness of the time worked and it is imperative that the attorney seeking an award of fees submit evidence, preferably in the form of contemporaneous time records, which set forth in detail the tasks allegedly performed and the time devoted to those tasks." Brandt Mem. at 10.[14] Tellingly, Mr. Brandt and Mr. Bainton cite no relevant authority where this phantom requirement was imposed.

By contrast, in *Ressler v. Jacobsen*, [1992-93 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶97,224 (M.D. Fla. 1992), a post-*Camden* common fund case in which the Court applied the percentage of the fund method, the Court, while taking note of the "time and labor required," did not engage the type of audit of plaintiffs' counsel's hours which Mr. Brandt and Mr. Bainton would have this Court do. Rather, the *Ressler* Court compared the *percentage of the fund* requested by counsel to the percentages "customarily found in standard contingency fee arrangements or

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14. This is not the first time that Mr. Bainton has applied erroneous law to a completely distinct legal doctrine. *See Warner Brothers, Inc. v. Dae Rim Trading, Inc.*, 677 F.Supp. 740, 760 (S.D.N.Y. 1988) *aff'd in part and rev'd in part, appeal dismissed*, 877 F.2d 1120 (2d Cir. 1989) ("the [plaintiff's, who was represented by Mr. Bainton] application of trademark concepts in a copyright case was an error of law. There is a great difference between the objective of trademark projection and the objective of copyright protection. The two legal doctrines are distinct, different and separate."). Similarly, the Court in *Camden I* acknowledged "the great distinctions between the policies and rationale supporting common fund fee awards versus statutory fee awards" that led to the Third Circuit commissioning the Task Force Report. 946 F.2d at 773.

awarded in class actions." 97,224 at 94,967.[15] That is the proper analysis which should be taken by this Court. Clearly, the adoption of the percentage of the fund approach is an effort to avoid the court having to undertake the tedious task of auditing detailed time records submitted by counsel. As one court has noted:

> A related weakness in the lodestar approach is that it often results in a substantial delay in distribution of the common fund to the class. The lodestar procedure requires detailed involvement by the District Court, evaluating the reasonableness of expenditure of attorney time and effort, and making comparative inquiries on reasonable rates for those services. Given the complexity of many class action lawsuits, combined with the degree of detailed review required and considering the heavy workload of most district court judges, lodestar calculation is likely to cause significant delay between the creation of a common fund and remuneration of class counsel. In contrast, the application of a percentage of the fund methodology is relatively straightforward and much less time consuming.

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15. Indeed, the *Ressler* Court specifically noted, "Under the 'lodestar' analysis, which is *not* the rule applied in this Circuit but which is still used in some circuits, the fee requested would be a 1.16 multiple of the lodestar. Such an award is extremely reasonable as courts in common fund cases regularly award multiples of 2 to 3 times lodestar in attorneys' fees to reflect the quality of the work performed and the risks undertaken." *Id.* (Emphasis in original). In this case, the fee requested would be approximately a 1.28 multiple of the lodestar.

Swedish Hospital Corp. v. Shalala, 1 F.3d 1261, 1270 (D.C. Cir. 1993).

Indeed, the adoption of the percentage of the fund approach alleviates the need for the Court to engage in a detailed analysis of counsel's time because:

> In the common fund case, if a percentage of the fund calculation controls, inefficiently expended hours only serve to reduce the per hour compensation of the attorney expending them.

Id. at 1269. This concept seems to elude Mr. Brandt and Mr.. Bainton. The inescapable conclusion is that the detailed analysis of Plaintiffs' counsel's time which Mr. Brandt and Mr. Bainton advocate has no place in these proceedings.

Further, although Brandt and his counsel have not directly objected to the settlement amount, they obliquely complain that Plaintiffs' counsel have not produced "evidence" to allow the Court to evaluate the "value" of the settlement and would have this Court disregard the settlement amount. Brandt Mem. at 8. Mr. Brandt and his counsel ignore the 13 pages of Plaintiffs' memorandum in support of the proposed settlement, which delineate and discuss *each* of the criteria for evaluating the fairness of the settlement as set forth in the Eleventh Circuit's opinion in *Bennett v. Behring Corp.*, 737 F.2d 982 (11th Cir. 1984).[16] In their Memorandum Plaintiffs further discuss, *inter*

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16. Notwithstanding Mr. Brandt and Mr. Bainton's representations to the contrary, Plaintiffs' counsel most certainly have presented facts establishing the adequacy of the proposed settlement which include the fact that, "although the total market losses of members of the Class likely exceed $100 million, Plaintiffs' (Cont'd)

alia: the vigorous litigation of this action for the past three years; the fact that Magistrate Johnson has already recommended dismissal of the Third Consolidated and Amended Complaint; the insolvency of Southeast and the seizure of its primary banking subsidiary; the various competing claims — including those asserted by Mr. Brandt — in excess of the amount of available directors' and officers' liability insurance; and the fact that, if any or all of these competing actions were to conclude before Plaintiffs in this action achieve success at trial, there is a substantial risk that the available directors' and officers' liability insurance could be depleted. Contrary to Brandt's assertions, therefore, Plaintiffs' Memorandum in Support of the Proposed Settlement contains an exhaustive analysis of why this settlement, in light of all of the attendant circumstances, is a good settlement.

Moreover, Mr. Brandt and Mr. Bainton once again ignore controlling precedent:

> [I]n evaluating the terms of the compromise in relation to the likely benefits of a successful trial, the trial judge ought not try the case in the settlement hearings . . .
>
> . . . The trial court should not make a proponent of a proposed settlement 'justify each term of the settlement against a hypothetical or speculative measure of what concessions might have been gained;

(Cont'd)
counsel has concluded, based upon data evaluated by their financial expert, that the *provable damages* may be no more than $26 million, assuming Plaintiffs establish the Defendants' liability." Plaintiffs' Memorandum in Support of the Proposed Class Action Settlement at pp. 15-16, 21-22.

> inherent in compromise is a yielding of absolutes and an abandoning of highest hopes.'

Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977).[17] The Court may not substitute its judgment for that of the parties who negotiated the settlement. *Id.*; *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 539 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990). Rather, in determining whether final approval should be granted, the Court must determine whether the proposed settlement falls within the "range of possible recovery." *Behrens*, 118 F.R.D. at 539.

Mr. Brandt and Mr. Bainton also seem to think that this Court can decide "what weight, if any, to give to the terms of this settlement in determining a reasonable fee" (Brandt Mem. at 6) based solely upon *Detroit v. Grinnell Corp.*, 560 F.2d 1093 (2d Cir. 1977), a pre-*Camden I* case which strictly applied the *Lindy* lodestar approach. Actually, inherent in the percentage of the fund approach is the fact that the *most* important factor is the size of the recovery. Mr. Brandt and Mr. Bainton cannot advocate in good faith, under *Camden I*, that this Court can ignore the size of the settlement in determining a percentage of the fund. It is axiomatic that, if attorneys' fees in common fund cases must be determined as a percentage of the fund, the amount of the fund must be taken into account. *See Camden I*, 946 F.2d at 744. ("[M]onetary results achieved predominate over all other criteria.") *See also Brown* 838 F.2d at 456 ("a decisive factor in this common fund class action case is the amount involved and the results obtained."); *Swedish*, 1 F.3d at 1269 ("In the common

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17. Decisions of the United States Court of Appeals for the Fifth Circuit rendered prior to October 1, 1981 are binding as precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

fund case . . . the monetary amount of the victory is often the true measure of success, and therefore it is most efficient that it influence the fee award.")

B. THE PERCENTAGE OF THE FUND REQUESTED BY PLAINTIFFS' COUNSEL IS REASONABLE UNDER CONTROLLING LAW

Contrary to Mr. Brandt and Mr. Bainton's accusation, Plaintiffs' counsel never suggested that the *Johnson* factors, to the extent applicable in any given case, are not relevant in determining a reasonable fee in a common fund case. However, the Court in *Camden I* unquestionably did reject the lodestar *approach* set forth in *Lindy Brothers* and *Johnson*. Thus, while the *Johnson* factors are relevant, the relative weights given those factors will vary when utilized in the percentage of the fund approach. *See Brown v. Phillips Petroleum*, 838 F.2d at 456. Brandt and his counsel ignore this difference in application and improperly continue to over-emphasize the "time and labor" factor, in essence reinstituting the very "lodestar" approach rejected by *Camden I*.

Plaintiffs' counsel satisfy the criteria outlined in *Camden I, and* address the *Johnson* factors applicable to this case including: the time and labor required; novelty and difficulty of the questions; the skill requisite to perform the legal services properly; the preclusion of other employment; the experience, reputation and ability of the attorneys; and awards in similar cases, as well as an additional factor noted by the Court in *Camden I* — the economics involved in prosecuting a class action. *See* Plaintiffs' Memorandum in Support of Proposed Settlement, pp. 27-35. Another additional factor set forth by the Court in *Camden I* is relevant to evaluating the fee award is "any substantial objections by class members or other parties to the

settlement terms or the fees requested by counsel." 946 F.2d at 775. In this regard it should be noted that there have been no objections to the settlement amount by any *bona fide* Class member. Further, Mr. Brandt is the only person who has objected to Plaintiffs' counsel's fee request. This is true notwithstanding the fact that more than *47,500* notices were mailed to Class members, as well as nominees and brokers.

As indicated by the Court in *Ressler*, an important factor in analyzing a fee request using a post-*Camden* percentage of the fund approach is whether the fee requested by petitioners when considered in terms of a percentage of the fund "is fair and reasonable when compared to the percentages customarily found in standard contingency fee arrangements or awarded in class actions." ¶97,224 at 94,967.

Although Plaintiffs' counsel have previously set forth a list of fee awards in various cases throughout the country well in excess of the 25% of the common fund requested herein,[18] set forth below (and attached hereto as Exhibits "6" through "11") are orders in six recent

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18. Mr. Brandt and Mr. Bainton misleadingly contend that Plaintiffs' counsel are requesting a fee of "over 33.3% of the amount to be received by all of the Plaintiffs." Brandt Mem. at 2. This is incorrect. Plaintiffs are requesting 25% of the common fund obtained for the benefit of the Class. Apparently Mr. Brandt and Mr. Bainton arrive at the 33.3% figure by subtracting the amount of Plaintiffs' fee request from the common fund and then comparing that amount to the remaining amount of the fund. This is clearly an inappropriate, and highly disingenuous, analysis under the percentage of the fund approach and Mr. Brandt and Mr. Bainton can cite no authority in support of their type of analysis. Rather, normal market conditions should be employed in determining contingent fees. *In Re: Continental Illinois Securities Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) ("The object in awarding a reasonable attorneys' fee . . . is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation had one been feasible."). Contingent fees are typically calculated as a percentage of the gross recovery.

common fund cases, five from this Court and one from the Middle District of Florida wherein fees equal to or in excess of 25% of the settlement fund were awarded: *In Re: Aero Systems, Inc. Securities Litigation*, Civil Action No. 90-0083-CIV-Paine (S.D. Fla. Oct. 19, 1993) (28% of $1,550,000 settlement); *In Re: Royce Laboratories, Inc. Securities Litigation*, Civil Action No. 92-0923-CIV-Moore (S.D. Fla. Sep. 28, 1993) (30% of settlement fund); *CV Reit, Inc. v. Levy, et al.*, Civil Action No. 91-8177-CIV-Gonzalez (S.D. Fla. Sep. 24, 1993) (26.9% of $2.45 million settlement); *In Re: Perfumania, Inc. Securities Litigation*, Civil Action No. 92-1490-CIV-Marcus (S.D. Fla. Sep. 22, 1993) (30% of $850,000 settlement); *Kaser v. Swann*, Civil Action No. 90-607-CIV-ORL-3A18 (M.D. Fla. April 13, 1993) (30% of net settlement fund after deduction of costs and expenses); *In Re: FPL Group Consolidated Litigation*, Civil Action No. 90-8461-CIV-Nesbitt (S.D. Fla. Feb. 24, 1992) (25% of settlement fund of $12.5 million).

Plaintiffs submit that, in light of the foregoing, Plaintiffs' counsels' request for 25% of the settlement fund is reasonable and should be approved by this Court.

Dated: November 12, 1993

Respectfully submitted,

CHIMICLES, BURT & JACOBSEN

By: s/Andrew H. Kayton for

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Fla. Bar No.: 261033
WENDY H. ZOBERMAN
Fla. Bar No.: 434670
Esperanté, Suite 960
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Appendix A

and

C. Oliver Burt, III
CHIMICLES, BURT & JACOBSEN
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361 W. Lancaster Avenue
Haverford, PA 19041
(215) 642-8500

and

STULL, STULL & BRODY

By: s/ Andrew H. Kayton for
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6 East 45th Street
New York, New York 10017
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and

LAW OFFICES OF JOSEPH H. WEISS

By: s/ Andrew H. Kayton for
Joseph H. Weiss
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and

Appendix A

WAMPLER, BUCHANAN & BREEN
Atlee W. Wampler, III
900 Sun Bank Building
777 Brickell Avenue
Miami, Florida 33131-2298

and

WOLF POPPER ROSS WOLF
& JONES
Marian Rosner
845 Third Avenue
New York, New York 10022

and

ABBEY & ELLIS
Mark Gardy
212 East 39th Street
New York, New York 10016

Attorneys for Plaintiffs

Appendix A

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via facsimile and U.S. Mail to J. Joseph Bainton, Esq., Ross & Hardies, Park Avenue Tower, 65 East 55th Street, New York, NY 10022-3219; Lewis F. Murphy, Esquire, Steel Hector & Davis, 4000 S.E. Financial Center, Miami, Florida 33131, and Robert T. Wright, Esquire, Mershon, Sawyer, Johnston, Dunwody and Cole, 4500 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, FL 33131; and by U.S. Mail to all other parties on the attached Service List, this 12th day of November, 1993.

s/ Andrew H. Kayton
ANDREW H. KAYTON, ESQUIRE

Appendix A

SERVICE LIST
IN RE: SOUTHEAST BANKING COP.
SECURITIES LITIGATION

Michael J. Pucillo, Esquire
Chimicles, Burt & Jacobsen
Esperante, Suite 960
222 Lakeview Avenue
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65 East 55th Street
New York, NY 10022-3219

APPENDIX B — NOTICE OF PENDENCY OF CLASS ACTION, PROPOSED SETTLEMENT, SETTLEMENT HEARING, AND RIGHT TO APPEAR AND NOTICE TO NOMINEES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MASTER FILE
CIVIL ACTION NO.
90-0760-CIV-MOORE

IN RE: SOUTHEAST BANKING CORP. SECURITIES LITIGATION

THIS DOCUMENT RELATES TO ALL ACTIONS

NOTICE OF PENDENCY OF CLASS ACTION, PROPOSED SETTLEMENT, SETTLEMENT HEARING, AND RIGHT TO APPEAR AND NOTICE TO NOMINEES

TO: ALL PERSONS WHO PURCHASED OR OTHERWISE ACQUIRED PUBLICLY TRADED SECURITIES OF SOUTHEAST BANKING CORP. DURING THE PERIOD FROM FEBRUARY 27, 1989 THROUGH AND INCLUDING SEPTEMBER 20, 1991. THE TERM "SECURITIES" INCLUDES COMMON STOCK, PREFERRED STOCK, CAPITAL NOTES, NOTES, CONVERTIBLE SUBORDINATED DEBENTURES, NON-CONVERTIBLE DEBENTURES AND/OR SECURITIZED ASSET INTERESTS.

PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. YOUR RIGHTS WILL BE AFFECTED BY LEGAL PROCEEDINGS IN THIS LITIGATION. IF YOU

Appendix B

PURCHASED OR ACQUIRED SOUTHEAST SECURITIES DURING THE PERIOD OF TIME DESCRIBED ABOVE (THE "CLASS PERIOD"), YOU MAY BE A CLASS MEMBER, ULTIMATELY ENTITLED TO RECEIVE BENEFITS PURSUANT TO THE PROPOSED SETTLEMENT DESCRIBED HEREIN, AND MAY BE BOUND BY A JUDGMENT RELEASING ANY CLAIMS THAT YOU MAY HAVE AGAINST THE DEFENDANTS, FORMER OFFICERS AND DIRECTORS OF SOUTHEAST AND OTHER RELEASED PARTIES. IF YOU WERE NOT THE BENEFICIAL OWNER OF SOUTHEAST SECURITIES AS DESCRIBED ABOVE DURING THE CLASS PERIOD, PLEASE TRANSMIT THIS DOCUMENT TO SUCH BENEFICIAL OWNER.

THE SETTLEMENT DESCRIBED IN THIS NOTICE IS SUBJECT TO COURT APPROVAL. THE COURT HAS NOT YET FINALLY CONSIDERED THE FAIRNESS OR ADEQUACY OF THE PROPOSED SETTLEMENT AND HAS NOT YET DETERMINED THE AMOUNT OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES TO BE AWARDED TO COUNSEL FOR THE REPRESENTATIVE CLASS PLAINTIFFS. THIS NOTICE IS NOT AN EXPRESSION OF ANY FINAL OPINION OF THE COURT AS TO THE REASONABLENESS OF THE PROPOSED SETTLEMENT OR ANY APPLICATION FOR ATTORNEYS' FEES AND EXPENSES. THE COURT WILL NOT RULE ON THE PROPOSED SETTLEMENT OR FEE APPLICATION UNTIL THE HEARING DESCRIBED BELOW.

IF YOU PURCHASED OR ACQUIRED SOUTHEAST SECURITIES DURING THE CLASS PERIOD FOR THE BENEFICIAL INTEREST OF A PERSON OTHER THAN

Appendix B

YOUSELF, IT IS IMPORTANT THAT YOU READ THE "SPECIAL NOTICE TO SECURITIES BROKERS AND OTHER NOMINEES" AT THE END OF THIS DOCUMENT.

IF YOU ARE A "RELEASED PARTY" AS DEFINED ON PAGE 3 OF THIS NOTICE, YOU SHOULD SEE THE "SPECIAL NOTICE TO RELEASED PARTIES" AT THE END OF THIS DOCUMENT.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN, pursuant to Rule 23 of the Federal Rules of Civil Procedure and an Order of the United States Distrct Court for the Southern District of Florida (the "Court") dated August 27, 1993, that a hearing will be held before the Honorable Kevin Michael Moore in the South Courtroom of the Old Federal Courthouse Building at 300 Northeast First Avenue, Miami, Florida 33128 at 8:30 a.m. on November 15, 1993 (the "Settlement Hearing") to determine whether a proposed settlement (the "Settlement") of the above-captioned litigation (the "Litigation") between class Representative Plaintiffs Harvey Wiener, William J. Hall, The Maynard Slessinger Trust, Paula P. Folkman, Gasper Sclafani, Myers L. Girsh and DCA Grantor Trust, individually and as representative of all Class Members (as hereinafter defined), and Defendants John E. Porta, Charles J. Zwick, Paul L. Hill, Kristen M. Hudak, Samuel A. Milne, Douglas E. Ebert and Florence Schust Bassett as Personal Representative of the Estate of Harry Hood Bassett (sometimes collectively referred to as the "Defendants"), as set forth in the Stipulation of Settlement dated August 19, 1993 (the "Stipulation"), is fair reasonable and adequate, and in the best interests of the Class Members, and to determine to what extent attorneys' fees,

reimbursement of expenses and individual awards to the named Plaintiffs should be awarded.

NOTICE OF CLASS ACTION DETERMINATION AND BACKGROUND OF THE LITIGATION

Pursuant to an Order entered by the District Court on August 27, 1993, the Court has certified this Litigation as a Class Action for settlement purposes on behalf of all persons who purchased or otherwise acquired publicly traded securities including common stock, preferred stock, capital notes, notes, convertible subordinated debentures, non-convertible debentures and securitized asset interests of Southeast Banking Corporation and its former corporate parents, subsidiaries (including Southeast Bank, N.A.), predecessors, successors and assigns ("Southeast") during the period from February 27, 1989 through and including September 20, 1991, excluding the Defendants herein, the former officers and directors of Southeast, members of their immediate families, their heirs, and affiliates, successors, and assigns of the Defendants.

If you do not elect to be exluded from the Class by following the steps described below, you are a "Class Member" and will be eligible to participate in the benefits of the Settlement as described herein, and will be subject to the terms of a Final Order and Judgment to be entered herein, barring you from pursuing any claims, rights, or causes of action that you may have against Defendants or other officers, directors, attorneys, advisors, insurers, agents or representatives of Southeast.

Following an investigation by Plaintiffs' counsel, on March 22, 1990, a class action complaint was filed in this

Court, captioned *Harvey Wiener v. Southeast Banking Corp., et al.*, Civil Action No. 90-0760. Shortly thereafter, another class action was filed in this Court, captioned *William J. Hall v. Southeast Banking Corp., et al.*, Civil Action No. 90-0838.

On April 6, 1990, Unitd States District Judge Eugene P. Spellman entered an Order of Consolidation and Reference consolidating the two actions and referring them to United States Magistrate Judge Linnea R. Johnson. On April 24, 1990, Magistrate Judge Johnson ordered that the cases be consolidated and that all pleadings be filed under Case No. 90-0760-CIV-EPS. On April 23, 1990, the actions were filed as one consolidated, amended complaint. Thereafter, on April 27, 1990, a Second Consolidated Amended Complaint was filed to correct certain matters. Defendants moved to dismiss the Second Consolidated Amended Complaint. On or about July 18, 1990, Magistrate Judge Johnson, upon the stipulation of the parties, granted Plaintiffs leave to file a Third Consolidated Amended Complaint. In that Complaint, Plaintiffs The Maynard Slessinger Trust and Paula P. Folkman joined in the action, alleging purchases of Southeast Banking Corp. securities during the second quarter of 1990. The Defendants moved to dismiss Plaintiffs' Third Consolidated Amended Complaint, On June 26, 1991, after hearing argument on Defendants' Motion to Dismiss Plaintiffs' Third Consolidated Amended Complaint, Magistrate Judge Linnea Johnson recommended the dismissal of the Third Consolidated Amended Complaint. On July 11, 1991, Plaintiffs filed objections to and moved to vacate the Magistrate's Report. However, those motions were never ruled upon and became moot due to subsequent intervening events.

On September 19, 1991, the Comptroller of the Currency

declared insolvent Southeast's principal subsidiary banks, Southeast Bank, N.A. ("Southeast Bank") and Southeast Bank of West Florida, and appointed the Federal Deposit Insurance Corporation ("FDIC") as Receiver of those banks. On September 20, 1991, Southeast Banking Corp. filed a bankruptcy petition under Chapter 7 of the United States Bankruptcy Code. The failure of Southeast Banking Corp. and its subsequent filing for Chapter 7 protection affected the Plaintiffs' ability to pursue their claims brought against that corporation, but did not eliminate the claims against the individual defendants named in the Third Consolidated Amended Complaint.

On November 7, 1991, Plaintiffs Wiener, Hall, The Maynard Slessinger Trust and Folkman, previously Plaintiffs in this action, as well as Plaintiffs Gasper Sclafani, Myers L. Girsh and DCA Grantor Trust, who sought to join as Plaintiffs in this action, moved to file a Fourth Consolidated Amended and Supplemental Complaint. The proposed Fourth Consolidated Amended and Supplemental Complaint deleted Southeast as a Defendant and sought recovery from the remaining Defendants, in addition to that sought in the Third Consolidated Amended Complaint, on behalf of those persons who purchased common stock and debentures of Southeast during the period from June 15, 1990 through July 3, 1991. On March 12, 1992, Unitd States District Judge William J. Zloch granted Plaintiffs' Motion to File a Fourth Consolidated Amended and Supplemental Complaint.

On June 16, 1992, the Trustee in Bankruptcy for Southeast Banking Corp. initiated an action against certain of the Defendants named in the Fourth Consolidated Amended and Supplemental Complaint, and other former officers and directors of Southeast Banking Corp., alleging

mismanagement and breaches of fiduciary duty, in an action styled *William A. Brandt, Jr. v. Florence S. Bassett, et al.*, Case No. 92-1600-Civ-Aronovitz (the "Trustee Suit"). On September 4, 1992, the FDIC moved to intervene in the Trustee Suit asserting that any claims that exist for mismanagement and breaches of fiduciary duty would be solely and exclusively the rights of the FDIC. The FDIC's Motion to Intervene was granted and, subsequent to the FDIC's Intervention in the Trustee Suit, both the FDIC and the Trustee moved for summary judgment on the issue of ownership of the claims. Both the Trustee and FDIC have asserted claims in excess of the amount of the available directors and officers' liability insurance, and each claim is viewed by Plaintiffs' lead counsel as a competing claim to the claims asserted on behalf of the Class in the Fourth Consolidated Amended and Supplemental Complaint.

On April 29, 1993, United States Magistrate Linnear R. Johnson recommended that the Trustee Suit be dismissed, and that the FDIC's Motion for Summary Judgment as to the ownership of the claims be granted. Plaintiffs' Lead Counsel thereafter attempted to explore a coordinated prosecution of the Class claims and the FDIC claims, with an appropriate allocation of the recovery to the Class. Those efforts failed, and it became apparent to Plaintiffs' Lead Counsel that the FDIC intends to prosecute its claim as a competing claim to the class action. On May 4, 1993, the Resolution Trust Corporation ("RTC"), acting as the receiver for American Pioneer Savings Bank, also filed a suit against, among others, the Defendants in this action, alleging violations of federal securities law in relation to Southeast. The RTC's suit is also a competing claim to the Class action.

During 1992 and 1993, the case proceeded through

additional motion practice. On August 19, 1993, after substantial investigation and negotiation, the parties entered into a Stipulation of Settlement.

SUMMARY OF SETTLEMENT

In full and complete settlement of all the Released Claims (as defined herein), encompassing all the claims which have or could have been asserted by Plaintiffs and the other Class Members against the Defendants or Released Parties (as defined below), and subject to the terms and conditions of the Stipulation, the Defendants have agreed to pay to Plaintiffs and the Class, the sum of $5,000,000 plus accrued interest thereon. After deducting attorneys' fees and reimbursement of expenses, including notice, the costs of settlement administration expenses, taxes, if any, and any incentive awards to the Named Plaintiffs allowed by the Court, the remaining funds will be distributed to Class Members who have submitted valid Proofs of Claim in accordance with the instructions herein.

Lead Counsel for the Plaintiffs has conducted an examination into and evaluation of the law and facts relating to the matters set forth in the Fourt Consolidated Amended and Supplemental Complaint regarding how best to confer a substantial benefit upon the Class, in light of the substantial obstacles to and risks of establishing liability and damages and the potential duration of this complex litigation.

Based upon their discovery and investigation and evaluation of the facts and law relating to the matters set forth in the Fourth Consolidated Amended and Supplemental Complaint, Plaintiffs' Lead Counsel has concluded that (*i*) irrespective of any merit to the claims asserted in the Fourth

Consolidated Amended and Supplemental Complaint, there are substantial obstacles to collecting any judgment that may be obtained; (*ii*) the attendant risks of litigation, especially in complex actions such as this, as well as the difficulties and delays inherent in such litigation, could substantially delay or eliminate any meaningful recovery; (*iii*) the uncertainty relating to the proof of the allegations included in the Fourth Consolidated Amended and Supplemental Complaint could jeopardize any recovery; (*iv*) the uncertainties regarding collection of any judgment posed by the competing claims of the Trustee, the FDIC, and the RTC could further jeopardize any recovery; (*v*) the desirability of permitting the Stipulation to be promptly consummated according to its terms is substantial; and (*vi*) resolution of the Litigation as set forth in the Stipulation confers a substantial benefit upon the Class and is in the best interest of the Class.

Defendants deny the material allegations of the Fourth Consolidated Amded and Supplemental Complaint and deny any and all liability with respect to any and all facts and claims alleged or that could have been alleged in this Litigation and continue to deny each and all of the claims and contentions alleged by Plaintiffs in the Litigation. The Defendants nonetheless consider it desirable that the Litigation be settled and dismissed in accordance with the provisions of the Stipulation because it will (*i*) halt the substantial expense, inconvenience and uncertainties associated with continued litigation of Plaintiffs' claims; (*ii*) finally put to rest those claims; and (*iii*) confer a substantial benefit upon the Class and the Defendants including, without limitation, the avoidance of further expense, diversion of resources and disruption due to the pendency of the Litigation.

Appendix B

The Court has not determined the merits of the claims against, or the defenses of, the Defendants. This notice does not imply that there has been or would be any finding of violation of the law, or that recovery could be had in any amount, if the Litigatgion were not settled with respect to the Defendants.

On October 12, 1993, prior to the Settlement Hearing, the parties will file with the Clerk of the Court any materials in support of the Settlement and pertaining to the other matters to be considered by the Court at the Settlement Hearing, including plaintiffs' counsels' petition for attorneys' fees and petition for reimbursement of costs and expenses.

If the Stipulation and the proposed Settlement are approved by the Court, all claims which have or, based upon the claims alleged, could have been asserted in the Litigation will be dismissed on the merits and with prejudice in accordance with the terms of the Stipulation as to all Class Members (except those who have properly excluded themselves from the Class), and all Class Members shall be forever barred from prosecuting a Class Action or any other action encompassing a Released Claim (as defined below).

The Settlement will become effective at such tme as the Order entered by the District Court finally approving the Settlement shall become final and not subject to appeal, as set forth in the stipulation (the "Settlement Effective Date"). If for any reason any of the contingencies set forth in the Stipulation is not met or complied with in accordance with its terms, then in that event, the Settlement may be terminated.

Upon final approval by the Court of the Settlement, and subject to the contingencies set forth in the Stipulation, all

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Class Members who are not determined by the Court to have properly excluded themselves from the Class shall conclusively be deemed to have remised, released and discharged, absolutely and forever, each and all of the Released Parties (as defined below) of and from any and all Released Claims (as defined below).

The *Released Parties* are the Defendants, and their respective spouses, heirs, executors, administrators, successors and assigns; National Union Fire Insurance Company of Pittsburgh, PA and any other insurers that provide directors' and officers' liability insurance to Southeast, and their directors and officers; and all former officers, directors, employees, agents, attorneys, auditors, accountants, representatives, advisors, insurers, reinsurers, actuaries, underwriters, commercial or investment bankers, investors, consultants, affiliates, independent contractors and associates (as defined in SEC Rule 12b-2, promulated pursuant to the Securities Exchange Act of 1934) of Southeast and their respective spouses, heirs, executors, administrators, successors and assigns. EXCEPT THAT ANY CLASS MEMBER WHO FILES A PROOF OF CLAIM SEEKING TO BENEFIT FROM THE SETTLEMENT FUNDS SHALL NOT BE A RELEASED PARTY.

The *Released Claims* are (*i*) any and all claims, actions or causes of action, rights or liabilities, including Unknown Claims, which have existed, exist, or may in the future exist against any Released Party by reaon of any matter, cause or thing whatsoever, arising out of, or relating to the offer, purchase, acquisition, sale, transfer, retention or exchange of Southeast Securities, by a Class Member; and (*ii*) any and all claims, actions, causes of action, rights or liabilities, including Unknown Claims, which a Class Member had, has

or may in the future have that are or could have been alleged, in the Litigation arising out of, or relating to any acts, omissions, or failures to act of any of the Released Parties, individually or in their capacities as officers, directors, shareholders, employees, agents, consultants, attorneys, auditors, accountants, representatives, insurers, reinsurers, actuaries, underwriters, commercial or investment bankers, investors, affiliates, independent contractors, associates, and/or advisors of Southeast.

Southeast Securities and/or Southeast's Securities mean any and all securities issued by Southeast and publicly traded during the Class Period, including but not limited to common stock, preferred stock, capital notes, notes, convertible subordinated debentures, non-convertible debentures and/or securitized asset interests.

Unknown Claims means any existing or future claims, demands, causes of action or rights, against any Released Party that the Class Members do not know or suspect to exist in their favor at the time the Final Order and Judgment is entered in this Litigation, provided that such claim(s) would arise out of, or relate to Southeast, including the offer, purchase, acquisition, sale, transfer, retention or exchange of Southeast's Securities.

CLASS MEMBERSHIP, FILING PROOF OF CLAIM, AND CALCULATION OF PAYABLE CLAIMS

TO BE ELIGIBLE TO PARTICIPATE IN THE DISTRIBUTION OF THE SETTLEMENT FUND, YOU MUST COMPLETE AND SIGN THE ATTACHED PROOF OF CLAIM FORM AND SEND IT BY PREPAID FIRST

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CLASS MAIL POST-MARKED ON OR BEFORE DECEMBER 27, 1993 AND ADDRESSED AS FOLLOWS:

Southeast Banking Corp. Securities
Litigation
Settlement Administrator
P.O. Box 1367
Blue Bell, PA 19422

IF YOU ARE A CLASS MEMBER AND IF YOU DO NOT TIMELY FILE A PROPER PROOF OF CLAIM FORM AND HAVE NOT EXCLUDED YOURSELF FROM THE CLASS, YOU WILL NOT SHARE IN THE SETTLEMENT FUND. HOWEVER, YOU WILL STILL BE BOUND BY THE FINAL ORDER AND JUDGMENT OF THE COURT DISMISSING THIS LITIGATION AND RELEASING ALL CLAIMS AND POTENTIAL CLAIMS AS SET FORTH ABOVE.

For purposes of the Settlement,

(a) "Claimant" means any Class Member who files a Proof of Claim in such manner and within such time as provided herein;

(b) "Authorized Claimant" means a Claimant who; properly completes the enclosed Proof of Claim form establishing the Claimant's status as a Class Member, who has a "Recognized Loss" as defined below, who has submitted it along with all required documentation to the Settlement Administrator at the address provided on the Proof of Claim form on or before December 27, 1993 on the basis of which the Class Member is found to have a right to participate in the benefits of the Settlement.

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All Proofs of Claim must be submitted by December 27, 1993. Any Class Member who fails to file a proper Proof of Claim with all required documentation by such date shall be forever barred from receiving any payment pursuant to the Stipulation but shall in all other respects be bound by the terms of the Stipulation and the Final Order and Judgment to be entered in the Litigation, including the terms of the release contained in the Stipulation. A Proof of Claim shall be deemed to have been timely submitted if received by the Settlement Administrator or postmarked on or before December 27, 1993.

Each Proof of Claim shall be submitted to and reviewed by the Settlement Administrator under the supervision of Plaintiffs' Lead Counsel, who shall determine in accordance with the Stipulation and the Court's Order with Respect to Notice, Settlement Hearing and Administration, the extent, if any, to which each claim shall be allowed, in the sole discretion of Plaintiffs' Lead Counsel, subject to final review by the Court.

The Settlment Administrator will notify, in writing, all Claimants whose Proofs of Claim have been rejected in whole or in part, setting forth the reasons therefor. Any Claimant whose claim has been finally rejected in whole or in part and who desires to contest such final rejection must, within twenty (20) days after the date of mailing of the notice of final rejection of the Proof of Claim, serve upon Plaintiffs' Lead Counsel by certified mail a notice and statement of reasons for contesting the final rejection along with any supporting documentation. Any such notice and statement shall be deemed served when actually received by Plaintiffs' Lead Counsel. Plaintiffs' Lead Counsel will thereafter present any such notice along with a response, if desired, for review and final decision by the Court.

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Each Claimant shall be deemed to have submitted to the jurisidiction of the Court with respect to the Claimant's claim, and the Claimant will be subject to discovery under the Federal Rules of Civil Procedure, limited to the Claimant's status as a Class Member, the amount and circumstances of the Claimant's claim, and the contents of the Proof of Claim as submitted.

The Net Settlement Funds consisting of the Settlement Funds, plus accrued interest, less (*i*) Attorneys' Fees and Expenses; (*ii*) Notice and Administration Expenses; and (*iii*) any awards to the Plaintiffs allowed by the Court, shall be allocated among the Authorized Claimants in the following manner (the amount so allocated to each Authorized Claimant constituting his or her "Payable Claim"):

(a) Each Authorized Claimant will be entitled to receive from the Net Settlement Fund that portion of the Net Settlement Fund represented by a fraction of the Net Settlement Fund which equals the individual Recognized Loss of such Authorized Claimant to the sum of all Recognized Losses of the Authorized Claimants;

(b) Each Authorized Claimant's Recognized Loss will be computed as set forth in the following Plan of Allocation:

(i.) All definitions set forth in the Stipulation of Settlement shall govern this Plan of Allocation, and

terms employed herein shall have the same meaning as in the Stipulation of Settlement. Additionally, "FIFO basis" means Southeast Securities purchased during the Class Period shall be matched in chronological order with Southeast Securities sold during the Class Period or held at the end of the Class Period on a first in, first out, basis.

(ii.) The Net Settlement Funds shall be allocated among claimants in two separate funds. Seventy percent (70%) of the Net Settlement Funds, plus any interest earned or accrued thereon, shall be allocated to claimants who purchased publicly traded Southeast Banking Corp. Stock (common or preferred), during the Class Period (the "Stock Fund"). Thirty percent (30%) of the Net Settlement Funds shall be allocated to Claimants who purchased publicly traded Southeast Banking Corp. debt securities (notes, capital notes, convertible and non-convertible subordinated debentures) during the Class Period (the "Debt Fund").

(iii.) Claims shall be paid to Claimants from the Stock Fund and

the Debt Fund in accordance with the Recognized Loss of each Claimant. The Recognized Loss shall be defined as a fraction, the numerator of which shall be the losses actually sustained by the Claimant, and the denominator of which shall be total value of the claims submitted by Claimants in the respective Stock and Bond Funds. The losses shall be determined by subtracting from the amount paid (less commissions and fees) for the Claimants' Southeast Securities, any funds received upon sale of such securities (exclusive of commissions or fees). Southeast Securities not sold during the Class Period shall have a market loss in the amount equal to the amount paid for such Southeast Securities (less commissions and fees) minus the publicly quoted price, if any, of such Southeast Securities on the last day of the Class Period.

(iv.) All determinations of losses shall be determined on a "FIFO" basis.

(v.) Prior to payment to Claimants, Court approval shall be obtained authorizing the distribution of the Net Settlement Funds to

claimants in accordance with the foregoing Plan of Allocation.

(c) The Net Settlement Fund shall be distributed to Authorized Claimants in accordance with the terms of the Stipulation and the Final Order and Judgment to be entered therein.

Payment in the manner set forth above shall be deemed conclusive as to the claims of all Class members. All Class Members who do not submit timely and properly completed Proofs of Claim against Settlement Funds or whose Proofs of Claim are not approved shall be barred from participating in distributions from Settlement Funds, but otherwise shall be bound by the terms and conditions of the Stipulation, including the terms of the Release contained in the Stipulation, and the Final Order and Judgment to be entered in the Litigation, unless they have been properly excluded from the Class.

REQUEST FOR EXCLUSION

IF YOU PROPERLY REQUEST EXCLUSION FROM THE CLASS, YOU WILL NOT RECEIVE ANY PAYMENT PURSUANT TO THE SETTLEMENT.

If you wish to be excluded from the Class, you may ask the Court to exclude you by filing a Request for Exclusion. Your Request for Exclusion must be in writing and postmarked on or before October 18, 1993. You must include your name, address and telephone number, and the caption of the Litigation and state that you wish to be excluded from the

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Class. *You MUST also list purchases of Southeast Securities during the Class Period (by number of shares, type of shares and price paid per share); sales or dispositions of such securities during the Class Period, if applicable (by number of shares, type of shares, and price received from any such sale or disposition); the date of each such transaction; and the name of the person in whose name the securities were registered.* You should also provide documentation of your transaction in Southeast Securities with your request for exclusion. All Requests for Exclusion must be mailed to: Lewis F. Murhphy, P.A., Steel Hector & Davis, 4000 First Union Financial Center, 200 S. Biscayne Boulevard, Miami, FL 33131-2398

If you properly and timely request exclusion from the Class, you will not be bound by any judgment entered in the Litigation, and you will be free to pursue whatever legal rights you may have against any of the Defendants at your own expense.

If you do not timely mail your election to be excluded from the Class and do not or cannot file a proper Proof of Claim that entitles you to receive Settlement proceeds, you will not share in the Settlement *but* you will be included automatically in the Class and bound by the Stipulation of Settlement and the Final Order and Judgment to be entered in this lawsuit pursuant thereto.

If you do not request exclusion from the Class you may, if you so choose, enter an appearance through legal counsel of your choice at your own expense and have all the rights and obligations set forth in Rule 23 of the Federal Rules of Civil Procedure. If this is your choice, you must notify the Clerk of

the Court, United States District Court for the Southern District of Florida, United States District Courthouse, 301 North Maimi Avenue, Miami, Florida 33128, that you wish to be represented by your personal attorney and send a copy of such notice to Michael J. Pucillo, Esquire at the address set forth below, and to Lewis F. Murphy, P.A., at the address set forth above. Any such request must be in writing and must be postmarked on or before November 1, 1993.

If you do not have your attorney appear for you, your interests will be represented by one or more of the following Lead counsel for the Class:

Michael J. Pucillo, Esquire
Chimicles, Burt & Jacobsen
222 Lakeview Avenue
Suite 960
West Palm Beach, FL 33401

Joseph H. Weiss, Esquire
319 Fifth Avenue
New York, NY 10016

Jules Brody, Esquire
6 East 45th Street
New York, NY 10017

SETTLEMENT HEARING

The Settlement Hearing will be held on November 15, 1993, at 8:30 a.m. in the Courtroom of Judge Kevin Michael Moore in the South Courtroom of the Old Federal Courthouse Building at 300 Northeast First Avenue, Miami, Florida 33128. The Settlement Hearing may be adjourned from time to time by the Court without further notice. Notice of any such adjournment may only be provided at the Settlement Hearing.

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At the Settlement Hearing, the Court will consider whether it should finally approve this Settlement and dismiss the Litigation on the merits and with prejudice. At the Settlement Hearing, any Class Member who has not previously filed a Request for Exclusion from the Class in the manner set fourth above may appear in person or by counsel and be heard to the extent allowed by the Court in support of, or in opposition to, the fairness, reasonableness and adequacy of the Settlement or any of the other matters to be considered by the Court, *provided,* however, that in no event shall a person be heard in opposition to the proposed Settlement, Plaintiffs' applications for counsel fees, reimbursement of expenses and/or individual awards to named Plaintiffs unless, on or before November 1, 1993 such person (*a*) files with the Clerk of the Court notice of such person's intention to appear, together with a statement that indicates the basis for such opposition which includes the information described in the second paragraph under the heading REQUEST FOR EXCLUSION hereof, along with any supporting documentation and; (*b*) serves copies of such notice, statement and documentation, together with copies of any other papers or briefs such person files with the Court, in person or by mail uopn each of the following attorneys:

Michael J. Pucillo, Esquire
Chimicles, Burt & Jacobsen
222 Lakeview Avenue
Suite 960
West Palm Beach, FL 33401
for Plaintiffs' Lead Counsel

Lewis F. Murphy, P.A.
Steel Hector & Davis
4000 First Union Financial Center
200 S. Biscayne Boulevard
Miami, FL 33131-2398
for Defendants' Representative Counsel

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ATTORNEYS' FEES, DISBURSEMENTS, AND INDIVIDUAL PAYMENTS TO NAMED PLAINTIFFS

At the Settlement Hearing or at such later time as the Court may direct, Plaintiffs' Lead Counsel will apply to the Court for an award from the Settlement Funds of attorneys' fees, which will not be in an amount greater than 25% of the Settlement Funds, and for reimbursements of out-of-pocket expenses, together with interest earned upon such amounts. Plaintiffs' Lead Counsel will also seek payment from the Settlement Funds of an amount, that will not exceed $2,000, to each of the named Plaintiffs over and above their proportionate share of the Settlement Funds.

EXAMINATION OF PAPERS AND INQUIRIES

For a more detailed statement of the matters involved in the Litigation, reference is made to the pleadings, to the Stipulation of Settlement, to the orders entered by the Court and to the other papers filed in the Litigation, which may be inspected at the Office of the Clerk of the United States Distrcit Court for the Southern District of Florida, 301 N. Miami Avenue, Miami, FL 33128, during business hours of each business day.

Any inquiries concerning this Notice or the Proof of Claim form by Class Members should be made to Plaintiffs' Lead Counsel *in writing*. No telephone inquiries should be made. Inquiries should *not* be directed to the Court or the Clerk's office.

Distribution of the proceeds of the Settlement is subject to Court approval.

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SPECIAL NOTICE TO SECURITIES BROKERS AND OTHER NOMINEES

If you purchased or acquired Southeast securities during the Class Period for the beneficial interest of a person or organization other than yourself, you are required to provide to the Settlement Administrator the name and last known address of each person or organization for whom or which you purchased or acquired Southeast Banking Corp. publicly traded securities, including common stock, preferred stock, capital notes, notes, convertible subordinated debentures, non-convertible debentures, and/or securitized asset interests during such time period. Such information should be sent to:

Southeast Banking Corp. Securities
Litigation
Settlement Administrator
P.O. Box 1367
Blue Bell, PA 19422

within seven (7) days of your receipt of this notice. The Settlement Administrator will forward copies of this Notice and a Proof of Claim form to each beneficial owner so designated by you in writing.

Alternatively, you may request additional copies of this Notice and Proof of Claim forms for each Class Member for whom you acted and whom you identify, which will be provided to you at the expense of the Class, and you may mail the Notice and Proof of Claim forms directly to the beneficial owners of the Southeast Securities referred to herein. You may be entitled to reimbursement of your reasonable out-of-pocket expenses actually incurred in connection with the foregoing,

provided that the Settlement Administrator will reimburse you at the prevailing domestic postage rate for each Notice and Proof of Claim form mailed to members of the Class at the lowest rate at which they could properly be mailed. No payment will be permitted for service charges, handling fees, excess postage or similar charges. Payment will be made for these charges as submitted by affidavit or declaration under penalty of perjury to the Settlement Administrator and only after review and approval by the Settlement Administrator.

SPECIAL NOTICE TO RELEASED PARTIES

Regardless of whether you purchased Southeast Securities during the Class Period, if you are a former officer or director of Southeast or if you are a spouse, heir, executor, administrator, successor or assign of a former officer or director of Southeast, including any Defendant in this Litigation, you are *NOT* a Class Member and may not participate in this Settlement as a Class Member. Other "Released Parties" — such as employees, accountants, attorneys and advisors of Southeast — who purchased Southeast Securities during the Class Period *ARE* Class Members and may participate in this Settlement as a Class Member. However, you cannot benefit financially from the Settlement Funds and also benefit from the release to Released Parties. Therefore, Class members who file a Proof a Claim and seek to benefit from the Settlement Funds will automatically lose their status as a "Released Party" and will in no way benefit from the release from potential liability conferred upon other Released Parties.

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Dated: September 15, 1993

CLERK, UNITED STATES DISTRICT COURT
T. G. CHELIOTIS

INSTRUCTIONS FOR COMPLETING SUBSTITUTE FORM W-9

(Section references are to the Internal Revenue Code.)

Purpose of Form. — A person who is required to file an information return with IRS must obtain your correct taxpayer identification number (TIN) to report income paid to you, real estate transactions, mortgage interest you paid, the acquisition or abandonment of secured property, or contributions you made to an individual retirement arrangement (IRA). Use Form W-9 to furnish your correct TIN to the requester (the person asking you to furnish your TIN), and, when applicable, (1) to certify that the TIN you are furnishing is correct, (2) to certify that you are not subject to backup withholding, and (3) to claim exemption fro backup withholding if you are an exempt payee. Furnishing your correct TIN and making the appropriate certifications will prevent certain payments from being subject to the 31% backup withholding.

Note: *If a requester gives you a form other than a W-9 to request your TIN, you must use the requester's form.*

How To Obtain a TIN. — If you do not have a TIN, you should apply for one immediately. To apply for the number, obtain Form SS-5, Application for a Social Security Number Card (for individuals), or Form SS-4, Application for Employer Identification Number (for businesses and all other

entities), at your local office of the Social Security Administration or the Internal Revenue Service. Complete and file the appropriate form according to its instructions.

To complete Form W-9 if you do not have a TIN, write "Applied For" in the space for the TIN in Part 1, sign and date the form, and give it to the requester. For payments that could be subject to backup withholding, you will then have 60 days to obtain a TIN and furnish it to the requester.

During the 60-day period, the payments you receive will not be subject to the 31% backup withholding, unless you make a withdrawal. However, if the requester does not receive your TIN form you within 60 days, backup withholding, if applicable, will begin and continue until you furnish your TIN to the requester.

Note: *Writing "Applied For" on the form means that you have already applied for a TIN OR that you intend to apply for one in the near future.*

As soon as you receive your TIN, complete another Form W-9, include your new TIN, sign and date the form, and give it to the requester.

What is Backup Withholding? — Persons making certain payments to you are required to withhold and pay to IRS 31% of such payments under certain conditions. This is called "backup withholding." Payments that could be subject to backup withholding include interest, dividends, broker and barter exchange transactions, rents, royalties, nonemployee compensation, and certain payments from fishing boat operators, but do not include real estate transactions.

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If you give the requester your correct TIN, make the appropriate certifications, and report all your taxable interest and dividends on your tax return, your payments will not be subject to backup withholding. Payments you receive will be subject to backup withholding if:

(1) You do not furnish your TIN to the requester, or

(2) IRS notifies the requester that you furnished an incorrect TIN, or

(3) You are notified by IRS that you are subject to backup withholding because you failed to report all your interest and dividends on your tax return (for interest and dividend accounts only), or

(4) You fail to certify to the requester that you are not subject to backup withholding under (3) above (for interest and dividend accounts opened after 1983 only), or

(5) You fail to certify your TIN. This applies only to interest, dividend, broker, or barter exchange accounts opened after 1983, or broker accounts considered inactive in 1983.

For other payments, you are subject to backup withholding only if (1) or (2) above applies.

Certain payees and payments are exempt from backup withholding and information reporting. *See Payees and Payments Exempt From Backup Withholding*, below, and *Exempt Payees and Payments* under *Specific Instructions*, on page 2, if you are an exempt payee.

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Payees and Payments Exempt From Backup Withholding. — The following lists payees that are exempt from backup withholding and information reporting. For interest and dividends, all listed payees are exempt except item (9). For broker transactions, payees listed in (1) through (13), and a person registered under the Investment Advisers Act of 1940 who regularly acts as a broker are exempt. Payments subject to reporting under sections 6041 and 6041A are generally exempt from backup withholding only if made to payees described in items (1) through (7), except that a corporation that provides medical and health care services or bills and collects payments for such services is not exempt from backup withholding or information reporting. Only payees described in items (2) through (6) are exempt from backup withholding for barter exchange transactions, patronage dividends, and payments by certain fishing boat operators.

(1) A corporation.

(2) An organization exempt from tax under section 501(a), or an individual retirement plan (IRA), or a custodial account under 403(b)(7).

(3) The United States or any agency or instrumentality thereof.

(4) A state, the District of Columbia, a possession of the United States, or any political subdivision or instrumentality thereof.

(5) A foreign government or a political subdivision, agency or instrumentality thereof.

(6) An international organization or any agency or instrumentality thereof.

(7) A foreign central bank of issue.

(8) A dealer in securities or commodities required to register in the U.S. or a possession of the U.S.

(9) A futures commission merchant registered with the Commodity Futures Trading Commission.

(10) A real estate investment trust.

(11) An entity registered at all times during the tax year under the Investment Company Act of 1940.

(12) A common trust fund operated by a bank under section 584(a).

(13) A financial institution.

(14) A middleman known in the investment community as a nominee or listed in the most recent publication of the American Society of Corporate Secretaries, Inc., Nominee List.

(15) A trust exempt from tax under section 664 or described in section 4947.

Payments of dividends and patronage dividends generally not subject to backup withholding also include the following:

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- Payments to nonresident aliens subject to withholding under section 1441.

- Payments to partnerships not engaged in a trade or business in the U.S. and that have at least one nonresident partner.

- Payments of patronage dividends not paid in money.

- Payments made by certain foreign organizations.

Payments of **interest** generally not subject to backup withholding include the following:

- Payments of interest on obligations issued by individuals. **Note:** *You may be subject to backup withholding if this interest is $600 or more and is paid in the course of the payer's trade or business and you have not provided your correct TIN to the payer.*

- Payments of tax-exempt interest (including exempt-interest dividends under section 852).

- Payments described in section 6049(b)(5) to nonresident aliens.

- Payments on tax-free covenant bonds under section 1451.

- Payments made by certain foreign organizations.

- Mortgage interest paid by you.

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Payments that are not subject to information reporting are also not subject to backup withholding. For details, see sections 6041, 6041A(a), 6042, 6044, 6045, 6049, 6050A, and 6050N, and the regulations under such sections.

Penalties

Failure To Furnish TIN. — If you fail to furnish your correct TIN to a requester, you are subject to a penalty of $50 for each such failure unless your failure is due to reasonable cause and not to willful neglect.

Failure to Include Certain Items on Your Tax Return. — If you fail to properly include on your tax return certain items reported to IRS, such failure will be treated as being due to negligence, and you will be subject to a penalty of 5% on any part of an underpayment of tax attributable to that failure unless there is clear and convincing evidence to the contrary.

Civil Penalty for False Information With Respect to Withholding. — If you make a false statement with no reasonable basis that results in no imposition of backup withholding, you are subject to a penalty of $500.

Criminal Penalty for Falsifying Information. — Willfully falsifying certifications or affirmations may subject you to criminal penalties including fines and/or imprisonment.

Specific Instructions

Name. — If you are an individual, generally provide the name shown on your social security card. However, if you have changed your last name, for instance, due to marriage, without

informing the Social Security Administration of the name change, you may enter your first name and both the last name shown on your social security card and your new last name.

Signing the Certification. —

(1) Interest, Dividend, and Barter Exchange Accounts Opened Before 1984 and Broker Accounts That Were Considered Active During 1983. — You are not required to sign the certification; however, you may do so. You are required to provide your correct TIN.

(2) Interest, Dividend, Broker and Barter Exchange Accounts Opened After 1983 and Broker Accounts That Were Considered Inactive During 1983. — You must sign the certification or backup withholding will apply. If you are subject to backup withholding will apply. If you are subject to backup withholding and you are merely providing your correct TIN to the requester, you must cross out item (2) in the certification before signing the form.

(3) Real Estate Transactions. — You must sign the certification. You may cross out item (2) of the certification if you wish.

(4) Other Payments. — You are required to furnish your correct TIN, but you are not required to sign the certification unless you have been notified of an incorrect TIN. Other payments include payments made in the course of the requester's trade or business for rents, royalties, goods (other than bills for merchandise), medical and health care services, payments to a nonemployee for services (including attorney and accounting fees), and payments to certain fishing boat crew members.

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(5) Mortgage Interest Paid by You, Acquisition or Abandonment of Secured Property, or IRA Contributions. — You are required to furnish your correct TIN, but you are not required to sign the certification.

(6) Exempt Payees and Payments. — If you are exempt from backup withholding, you should complete this form to avoid possible erroneous backup withholding. Enter your correct TIN in Part I, write "EXEMPT" in the block in Part II, cross out item (2) of the certification, sign and date the form. If you are a nonresident alien or foreign entity not subject to backup withholding, give the requester a completed Form W-8, Certificate of Foreign Status.

(7) TIN "Applied For." — Follow the instructions under *How To Obtain a TIN*, earlier, sign and date this form.

Signature. — For a joint account, only the person whose TIN is shown in Part I should sign the form.

Privacy Act Notice. — Section 6109 requires you to furnish your correct taxpayer identification number (TIN) to persons who must file information returns with IRS to report interest, dividends, and certain other income paid to you, mortgage interest you paid, the acquisition or abandonment of secured property, or contributions you made to an individual retirement arrangement (IRA). IRS uses the numbers for identification purposes and to help verify the accuracy of your tax return. You must provide your TIN whether or not you are required to file a tax return. Payers must generally withhold 31% of taxable interest, dividend, and certain other payments to a payee who does not furnish a TIN to a payer. Certain penalties may also apply.

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What Name and Number to Give the Requester

For this type of account:	Give the name and SOCIAL SECURITY number of:
1. Individual	The individual
2. Two or more individuals (joint account)	The actual owner of the account or, if combined funds, the first individual on the account[1]
3. Custodian account of a minor (Uniform Gift to Minors Act)	The minor[2]
4. a. The usual revocable savings trust (grantor is also trustee)	The grantor-trustee[1]
b. So-called trust account that is not a legal or valid trust under state law	The actual owner[1]
5. Sole proprietorship	The owner[3]

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For this type of account:	Give the name and EMPLOYER IDENTIFICATION number of:
6. A valid trust, estate, or pension trust	Legal entity (Do not furnish the identification number of the personal representative or trustee unless the legal entity itself is not designated in the account title.)[4]
7. Corporate	The corporation
8. Association, club, religious, charitable, educational, or other tax-exempt organization	The organization
9. Partnership	The Partnership
10. A broker or registered nominee	The broker or nominee
11. Account with the Department of Agriculture in the name of a public entity (such as a state or local government, school district, or prison) that receives agricultural program payments	The public entity

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[1] **List first and circle the name of the person whose number you furnish.**

[2] **Circle the minor's name and furnish the minor's social security number.**

[3] **Show the name of the owner.**

[4] **List first and circle the name of the legal trust, estate, or pension trust.**

Note: ***If no name is circled when there is more than one name, the number will bne considered to be that of the first name listed.***

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MASTER FILE
CIVIL ACTION NO.
90-0760-CIV-MOORE

IN RE: SOUTHEAST BANKING CORP.SECURITIES LITIGATION

THIS DOCUMENT RELATES TO ALL ACTIONS

PROOF OF CLAIM AND RELEASE

NOTE: YOU SHOULD NOT COMPLETE THIS FORM UNLESS YOU PURCHASED SOUTHEAST BANKING CORP. PUBLICLY TRADED COMMON STOCK, PREFERRED STOCK, CAPITAL NOTES, NOTES, CONVERTIBLE SUBORDINATED DEBENTURES, NON-CONVERTIBLE DEBENTURES, SECURITIZED ASSET INTERESTS AND/OR OTHER PUBLICLY TRADED SECURITIES OF SOUTHEAST BANKING CORP. DURING THE PERIOD FROM FEBRUARY 27, 1989 THROUGH SEPTEMBER 20, 1991. IF YOU DID SO, YOU ARE A "CLASS MEMBER" ENTITLED TO PARTICIPATE IN THE SETTLEMENT OF THE LITIGATION, AND YOU MAY BE ENTITLED TO SETTLEMENT PROCEEDS. (Excluded from the Class are the Defendants, former officers and directors of Southeast Banking Corp., and their spouses, heirs, executors, administrators, successors and assigns, and those persons who have excluded themselves pursuant to the provisions of the Notice.)

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IN ORDER TO RECEIVE ANY PAYMENTS TO WHICH YOU MAY BE ENTITLED AS A CLASS MEMBER, YOU MUST COMPLETE AND SIGN THIS PROOF OF CLAIM, AND MAIL IT BY PRE-PAID, FIRST CLASS MAIL, POSTMARKED NO LATER THAN DECEMBER 27,1993 TO THE FOLLOWING ADDRESS:

Southeast Banking Corp. Securities Litigation
Settlement Administrator
P.O. Box 1367
Blue Bell, PA 19422

YOUR FAILURE TO SUBMIT YOUR CLAIM BY DECEMBER 27, 1993 WILL SUBJECT YOUR CLAIM TO REJECTION AND PRECLUDE YOU FROM RECEIVING ANY MONEY IN CONNECTION WITH THE SETTLEMENT OF THIS LITIGATION. DO NOT MAIL OR DELIVER YOUR CLAIM TO THE COURT OR TO ANY OF THE PARTIES OR THEIR COUNSEL, AS ANY SUCH CLAIM WILL BE DEEMED NOT TO HAVE BEEN SUBMITTED.

THIS WILL BE YOUR ONLY OPPORTUNITY TO SHARE IN THE BENEFITS OF THE SETTLEMENT OF THIS ACTION. HOWEVER, EVEN IF YOU DO NOT SUBMIT THIS PROOF OF CLAIM, YOU WILL BE BOUND BY THE COURT'S FINAL ORDER AND JUDGMENT IN THIS MATTER AND WILL BE FOREVER BARRED FROM PURSUING ANY ACTION AGAINST ANY OF THE DEFENDANTS IN THIS ACTION, OR ANY RELEASED PARTY, RELATING TO ANY RELEASED CLAIM UNLESS YOU HAVE BEEN PROPERLY EXCLUDED FROM THE CLASS.

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I. I did __, I did not __ (check one) purchase any publicly traded securities of Southeast Banking Corp. ("Southeast") during the period from February 27, 1989 through and including September 20, 1991.

II. By submitting this Proof of Claim, I state that I believe in good faith that I am a Class Member as defined in the Notice of Pendency of Class Action, Proposed Settlement, Settlement Hearing, and Right to Appear ("Notice"), or am acting for such person; that I have read and understood the contents of the Notice; that I am not, and am not acting for any of the Defendants herein or the former officers or directors of Southeast Banking Corp. or their spouses, heirs, executors, administrators, successors or assigns; that I have not filed a Request for Exclusion, seeking to be excluded from the Class; that I believe that I am entitled to receive a share of the Net Settlement Fund; and that I elect to participate In the proposed Settlement described in the Notice.

III. I have set forth where requested all relevant information with respect to each purchase, of Southeast's publicly traded securities during the Class Period; and each sale, if any, of such securities.

IV. I have enclosed photocoples or facsimiles of the stockbrokers confirmation slips or other documents evidencing each acquisition and sale 1isted below in support of my claimed loss. (*NOTE:* IF ANY SUCH DOCUMENTS ARE NOT IN YOUR POSSESSION, PLEASE OBTAIN A COPY, FACSIMILE OR EQUIVALENT DOCUMENTS FROM YOUR BROKER BECAUSE THESE DOCUMENTS ARE NECESSARY TO PROVE AND PROCESS YOUR CLAIM.)

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V. I agree and understand that if the proposed Settlement is approved by the Court and becomes effective, all claims, demands, or causes of action against any or all Defendants and certain other persons which have been or could have been asserted relating to the subject matter of the litigation will be satisfied, discharged and extinguished forever in accordance with the Release provided on behalf of Class Members in the Stipulation of Settlement and by the terms of the Final Order and Judgment.

VI. My signature hereto constitutes a full and complete release, remise and discharge by me or, if I am submitting this Proof of Claim on behalf of a corporation, partnership, estate or one or more persons, by it, him, her or them, and by my, its, his, her or their heirs, executors, administrators, successors, affiliates and assigns, of all Defendnats, former officers, directors, employees, agents, attorneys, auditors, accountants, representatives, advisors, insurers, reinsurers, actuaries, underwriters, commercial or investment bankers, consultants, investors, affiliates, independent contractors and associates of Southeast Banking Corp. and its subsidiaries, affiliates, divisions and predecessors or successor corporations, and their respective spouses, heirs, executors, administrators, successors, affiliates and assigns, and each of them (the "Released Parties as defined in paragraph A.1.x of the Stipulation of Settlement), from all Released Claims as defined in paragraph A.1.w of the Stipulation of Settlement. The Released Claims are: (1) any and all claims, actions or causes of action, rights or liabilities, including Unknown Claims, which have existed, exist, or may in the future exist against any Released Party by reason of any matter, cause or thing whatsoever, arising out of, or relating to the offer, purchase, acquisition, sale, transfer, retention or exchange of

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Southeast Securities, by a Class Member; and (ii) any and all claims, actions, causes of action, rights or liabilties, including Unknown Claims, which a Class Member had, has, or may in the future have that are or could have been alleged in the Litigation arising out of, or relating to any acts, omissions, or failures to act of any of the Released Parties, individually or in their capacities as officers, directors, shareholders, employees, agents, consultants, attorneys, auditors, accountants, representatives, insurers, reinsurers, actuaries, underwriters, commercial or investment bankers, investors, affiliates, independent contractors, associates, and/or advisors of Southeast. This release, however, is conditioned upon the Court's approval of the Settlement and upon the Settlement becoming effective.

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VII. STATEMENT OF CLAIM

Name(s) of
Beneficial Owner(s) _____

Street No.
and Street: _____

City: _____ State:__ Zip Code:___-___

Country: _____ Telephone Number:___-___

Taxpayer I.D.No.: -__ OR Social Security Number:__-__-__

_Individual _Corporation _Estate _Other (specify) _____

Area Telephone No. (work) Area Telephone No. (home)

_____

Record Owner's Name (if different from Beneficial Owner listed above)

A. Claimant(s) made the follwing purchases of Southeast's publicly traded securities during the Class Period. *All references to purchase dates relate to trade dates, not settlement dates.* (If you have acquired any Southeast common stock that had been *purchased during the Class Period* by gift, inheritance, or operation law, you are to report this transaction as if you acquired the stock at the same time asnd at the same cost as the person who purchased such security):

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Type of Security	Date(s) of Purchase (List Chrono-logically) Month/Day/ Year - -	Number of Shares/ Debentures	Purchase Price Per Share/ Debenture (excluding commission, taxes and fees) $.	Aggregate Cost excluding commission, taxes and fees) $.

* * *

(indicate with an asterisk (*) any transaction held in the name of the record owners(s) listed above.)

B. Of the shares listed in Section VII.A above, Claimant(s) sold the follwing Southeast publicly traded securities during the Class Period. *(All references to sale dates relate to trade dates, not settlement dates):*

Type of Security	Date(s) of Sale (List Chrono-logically) Month/Day/ Year - -	Number of Shares/ Debentures Sold	Selling Price Per Share/ Debenture (excluding commission, taxes and fees) $.	Amount Realized (aggregate proceeds excluding commission, taxes and fees) $.

* * *

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VIII. SUBSTITUTE FORM W-9

Request for Taxpayer Identification Number. Enter taxpayer identification number below for the Beneficial Owner(s). For most individuals, this your Social Security number. The Internal Revenue Service requires such taxpayer identification number. If you fail to furnish the correct taxpayer identification, 31% of the interest portion of your distributive share of the Settlement Funds will be withheld and/or your claim will be rejected.

Social Security Number: - -
(for individuals)
or
Employer Identification Number: —
(for estates, trusts, corporations, etc.)

NOTE: A copy of the I.R.S. Guidelines for certification of Taxpayer Identification Number on Substitute Form W-9 and a description of payees subject to or exempt from the backup withholding requirements are included as part of the Notice accompanying this Proof of Claim form.

IX. CERTIFICATION

UNDER THE PENALTIES OF PERJURY, I (WE) CERTIFY THAT ALL OF THE INFORMATION PROVIDED ON THIS FORM IS TRUE, CORRECT AND COMPLETE.

I (We) certify that I am (we are) NOT subject to backup withholding, under the provisions of Section 3406(a)(1)(c) of the Internal Revenue Code.

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NOTE: If you have been notified by the Internal Revenue Service that you are subject to backup withholding, please strike out the language that you are not subject to backup withholding in the certification above.

Signature of Claimant
(If this claim is being made on behalf of Joint Claimants, each must sign)

Date: (Signature)

(Print Name)

Date: (Signature)

(Print Name)

THIS PROOF OF CLAIM MUST BE RECEIVED BY THE SETTLEMENT ADMINISTRATOR OR POSTMARKED NO LATER THAN DECEMBER 27, 1993, AND MUST BE MAILED TO:

Southeast Banking Corp. Securities Litigation
Settlement Administrator
P.O. Box 1367
Blue Bell, PA 19422

NOTE: If you wish to be assured that your Proof of Claim is actually received by the Settlement Administrator, you should send it by Certified Mail. Return Receipt Requested. Certified Mail may, however require more time for delivery than first class mail. No acknowledgement will be made as to the receipt

of claim forms. You should be aware that it will take a significant amount of time to process fully all of the Proofs of Claim and to administer the settlement. This work will be completed as promptly as time permits, given the need to fully investigate and tabulate each Proof of Claim. In the interim, the Settlement Fund is earning interest in which you will share, *pro rata*.

No. 95-631

Supreme Court, U.S.
FILED
DEC 4 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

IN RE: SOUTHEAST BANKING CORP. SECURITIES LITIGATION

WILLIAM A. BRANDT, JR., AS ADMINISTRATOR OF THE INVESTMENT PLUS PLAN OF THE SOUTHEAST BANKING CORPORATION,

Petitioner,

—v.—

HARVEY WEINER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Counsel of Record

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IN THE

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OCTOBER TERM, 1995

No. 95-631

IN RE: SOUTHEAST BANKING CORP. SECURITIES LITIGATION

WILLIAM A. BRANDT, JR., AS ADMINISTRATOR OF THE INVESTMENT PLUS PLAN OF THE SOUTHEAST BANKING CORPORATION,

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HARVEY WEINER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

INTRODUCTION

Respondent has failed to come to grips with the fact that the decision below concerns an important and recurring issue of federal class action procedure that continues to divide the appellate courts. Unable to counter petitioner's principal basis for review—a profound and mature split among the circuits—respondent claims that a 1988 decision of this Court on an

issue having nothing to do with the question presented here somehow resolved the question in a manner consistent with the decision below. However, contrary to respondent's position, the division among the circuits has remained and, in fact, has deepened since the decision upon which respondent relies, *Marino v. Ortiz*, 484 U.S. 301 (1988). Further, as we show below, the rule urged by respondent is at odds with several decisions of this Court and if allowed to escape review, will have an adverse impact on class action practice.

ARGUMENT

A. The Split Among the Circuits is Real and Growing

Respondent's assertion that the split among the circuits on the question presented does not survive this Court's decision in *Marino v. Ortiz*, 484 U.S. 301 (1988), is simply wrong.

As noted in the Petition, the Ninth Circuit has repeatedly held that unnamed class members may appeal an approval of a class action settlement whether or not they have sought intervention, and, has permitted non-intervening class members to prosecute appeals since *Marino*. *See, e.g., Silber v. Mabon*, 957 F.2d 697 (9th Cir. 1992); *see also Matter of VMS Ltd. Partnership Securities Litig.*, 976 F.2d 362, 367 (7th Cir. 1992) (thereby placing Ninth Circuit among circuits that do not require intervention as prerequisite to appeal approval of class action settlement).

The Seventh Circuit has also recently made it clear that it will continue to adhere to its steady line of authority—dating back to *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970)—that unnamed class members have standing to appeal approval of a class settlement even though they have not intervened. In *VMS*, the Seventh Circuit dismissed an appeal because the class member was appealing a post-settlement implementation order, but took pains to note that

"*Research Corp.* would control in this circuit if [the appellant] were appealing the approval of the settlement agreement," as petitioner sought to do below. *VMS*, 976 F.2d at 368.

In *Carlough v. Amchem Products, Inc.*, 5 F.3d 707, 713-14 (3d Cir. 1993), the Third Circuit considered an interlocutory appeal by unnamed class members who, in the course of prosecuting their objections to a class settlement, had been denied intervention by the district court. Responding to the class members' concerns that their appellate standing might be challenged if the proposed settlement were later approved, the Third Circuit dismissed the appeal, in reliance on its prior decisions in *Ace Heating & Plumbing Co., Inc. v. Crane Co.*, 453 F.2d 30, 33 (1971), and *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993), that the class members' concerns were misplaced because they had the absolute right to appeal absent intervention. *Carlough*, 5 F.3d at 714.

Finally, as explained in the Petition, the Tenth Circuit, in two post-*Marino* decisions, has taken an intermediate position that has added to the confusion, holding that intervention is required of class members who seek to appeal the merits of the settlement, but is not required of class members who appeal an award of attorney's fees to the class lawyers. *See Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Rosenbaum v. MacAllister*, 64 F.3d 1439 (10th Cir. 1995).

Respondent argues only that *Rosenbaum* "does not withstand close scrutiny," Opp. 10 n.10, but petitioner's disagreement with *Rosenbaum* on its merits only highlights the serious circuit split and the need for review by this Court.[1]

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[1] Respondents' mischaracterization of the circuit split as "neither real" nor "significant", Opp. 2, is, charitably put, misleading. Indeed, since *Marino*, no fewer than four circuits have recognized and discussed the split. In *Rosenbaum*, *supra*, the Tenth Circuit stated:

> The issue whether a class member must intervene to the underlying suit to have standing to challenge approval of a settlement has split the circuits. Compare *Shults v. Champion Int'l Corp.*, 35 F.3d

This brings to four the number of circuits that part company with the decision below. If this case arose out of any of those circuits rather than the Eleventh Circuit, petitioner would be allowed to appeal the district court's $1.25 million fee award, even though he did not formally intervene. Only the Court can impose uniformity on this important question of Federal Procedure.

B. This Court's Decision in Marino Underscores the Need for Review

In *Marino, supra,* this Court held that a consent decree involving a class of African-American and Hispanic police officers could not be challenged on appeal by white officers who were *not* members of the class and who had not intervened in the district court pursuant to Federal Rule of Civil

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1056 (6th Cir. 1994) (requiring intervention); *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 679-81 (8th Cir. 1992), (same) cert. denied, ___ U.S. ___, 113 S.Ct. 1251 (1993); *Walker v. City of Mesquite*, 858 F.2d 1071, 1074 (5th Cir. 1988) (same); *Guthrie v. Evans*, 815 F.2d 626, 628-29 (11th Cir. 1987) (same) with *Carlough v. Amchem Prods., Inc.*, 5 F.3d 707, 713-14 (3d Cir. 1993) (no intervention required); *Armstrong v. Board of Sch. Directors*, 616 F.2d 305, 327-28 (7th Cir. 1980) (same). This Court has recently joined the circuits that require intervention by a Rule 23(b)(3) case in order to have standing to appeal the district court's approval of the settlement. *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993).

64 F.3d at 1441-42. *See also Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1307-08 (3rd Cir. 1993) (discussing circuit split at some length and concluding "it is not settled whether an objecting member of the class or derivative litigation who is not a named party may appeal the court's approval of [a settlement]".); *VMS Limited Partnership Securities Litigation*, 976 F.2d 362, 367 (7th Cir. 1992) ("[s]everal circuits . . . have addressed the issue . . . and have reached conflicting conclusions"); *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675, 678 (8th Cir. 1992) (extensive review of case law, concluding that "[t]he circuits are divided on this issue, and some have inconsistent holdings").

Accordingly, any assertion by the Respondents that the division among the circuits is neither real nor significant is without merit and contrary to the circuit courts' own view of the state of the Law.

Procedure 24. 484 U.S. at 304. *Marino* reflects the familiar concept that *non-parties* must seek formal participatory status to assert their interests in a lawsuit. Absent class members, on the other hand, need not employ such mechanisms, since, like the African-American and Hispanic police officers in *Marino*, they are, in effect, already parties to the lawsuit. Indeed, the class notice specifically invited all class members to appear individually or through counsel to state their objections, Resp. App. 45a-47a, and petitioner did so.[2]

While *Marino* does not speak to the question presented, two other decisions of this Court support the position that absent class members need not seek intervention to be accorded the same basic rights and obligations that accrue to the named plaintiffs. First, in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 551 (1974), the Court held that the filing of a class action under Federal Rule of Civil Procedure 23 tolls the applicable statute of limitations for absent class members, as well as the named plaintiffs, because such class members are "parties to the suit." Second, in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), the Court held that the claims of absent class members, just like the claims of the representative plaintiffs, must meet the jurisdictional amount in diversity cases under 28 U.S.C. § 1332. As *American Pipe* and *Zahn* demonstrate, unnamed class members, unlike the outsiders in *Marino*, are already full participants in the litigation, and should not be required to become intervenors to partake in either the advantages or the burdens of class litigation.

We acknowledge that several courts, including the Eleventh Circuit, have read *Marino* to support an intervention requirement for class members who seek to appeal the approval of a class action settlement. But, as explained in Part A above, the deep split in the circuits remains and has deepened since

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[2] Significantly, however, the class notice did *not* advise the class members that they could seek intervention in the action, nor did it tell them that a failure to intervene would bar them from appealing any decision of the district court. Resp. App. 45a-47a.

Marino; post-Marino Circuit decisions have only widened the divisions. In addition, the fact that a number of circuits have taken *Marino*'s intervention requirement for *non-parties* and applied it to class members who are parties to the litigation provides another reason for this Court to grant the petition and to clarify the scope of *Marino* in light of this Court's prior decisions in *American Pipe* and *Zahn*.

C. A Rule Requiring Intervention Poses Practical Problems That Should Be Resolved by This Court.

The ruling of the court of appeals presents practical problems for the administration of class actions that should be resolved by this Court. First, as noted above, intervention under Rule 24 is designed to permit *non-parties* that have demonstrated the requisite interest in the subject matter of the suit to *litigate* the underlying case. Thus, potential intervenors file complaints in intervention, *see* Fed. R. Civ. P. 24(c), setting out the claims against the defendant which they believe are not being adequately advanced by the plaintiffs. In the class action settlement context at issue here, however, the absent class members do not generally want (or have the resources) to litigate the case, and merely seek to challenge a proposed settlement or some aspect thereof, such as the fees awarded class counsel which, if excessive, would unfairly diminish the class member's recovery. *See Rosenbaum*, 64 F.3d at 1440.

Requiring intervention under such circumstances does nothing to protect the interests of the courts or the settling parties. Assuming that absent class members are aware of the intervention requirement, they will file papers explaining the obvious fact that their interests are adverse to the settling parties and that they desire intervention status solely to protect their appellate standing. The district judge may be hard pressed not to grant intervention in such circumstances, since to do otherwise could be tantamount to denying the objector's right to

appeal. In sum, requiring intervention would be more burdensome for both litigants and judges, with no countervailing benefit.

Second, if absent class members are required to intervene, the courts will become enmeshed in questions regarding whether intervention gives the absent class members full party status typically accorded to "regular" intervenors. Thus, for instance, there would be the question whether absent class members—reclassified as "intervenors"—could unilaterally reject the settlement and litigate the case. Once granted intervention status, absent class members would argue with considerable force that their discovery rights should be the same as those of the named parties. These are important substantive questions, but they should not turn on whether the absent class member is an intervenor. To be sure, the courts might read into Rule 24 the possibility of "limited" intervention to absent class members to make sure that their rights to appeal are preserved, but if that is the only purpose, why require intervention in the first place?[3]

Respondent argues that petitioner should not be heard to complain about the fairness of the settlement and class counsel's healthy fee award because petitioner neglected to follow established procedural practice in "failing" to seek intervention. In one sense, of course, that begs the question of whether intervention should be required. Moreover, respondent overlooks a critical factor about the nature of class litigation. Unlike traditional litigation, in the class action settlement context, under Rules 23(c)(2) and (e), hundreds of

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[3] Moreover, because non-intervening absent class members have a right to appear in the district court and present arguments and evidence as to why the settlement should not be approved, Fed. R. Civ. P. 23(c)(2)(C); 1966 Advisory Committee Note to Fed. R. Civ. P. 23(d)(2); MANUAL FOR COMPLEX LITIGATION THIRD § 30.41 (1995), there is a strong argument that requiring absent class members to attain intervention status solely for purposes of appeal is at odds with 28 U.S.C. § 1291's appeal as of right in civil cases.

unrepresented class members are affirmatively invited to file objections and participate in a fairness hearing held pursuant to Rule 23(e). *See* MANUAL FOR COMPLEX LITIGATION THIRD § 41.42 (1995) (Form Order and Motion of Class Action Settlement). This Court has previously expressed grave concern that the rights of unrepresented absent class members not be shortchanged in the rush to dispose of large-scale class litigation. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812-13 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (1974). Given the customary involvement in class actions of *pro se* class members, unschooled in the nuances of federal procedural practice, there is all the more reason not to create hidden barriers to the exercise of one's appellate rights. These concerns provide another reason for this Court to grant review and resolve the profound division among the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
December 1, 1995

Respectfully submitted,

J. Joseph Bainton
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